Supreme Court, U.S.
FILED
(1)
No. 011304 NOV 5 - 2001
In The OFFICE OF THE CLERK

Supreme Court of the United States

JAMES GORMLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

Mark J. Kadish
Counsel of Record
ATTORNEY AT LAW
5525 Cross Gate Court
Atlanta, Georgia 30327
(404) 252-7799

Counsel for Petitioner

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

7088

QUESTIONS PRESENTED

1. Did the District Court and the Court of Appeals err in finding a single wire fraud conspiracy charged in the indictment when the Government proved three separate and distinct conspiracies creating a material variance resulting in a violation of the Fifth Amendment's guarantee that Petitioner must be tried on the indictment returned by the Grand Jury?

2. Did the District Court and the Court of Appeals err by not perceiving Petitioner's Fifth Amendment Due Process claim that his conduct relating to Counts Two, Three and Six was within the legal and ethical boundaries permitted by law; this issue was raised below only in terms of insufficiency of the evidence, not as a Constitutional deprivation arising out of a failure to properly instruct the jury although trial counsel failed to request a specific instruction?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ii

TABLE OF AUTHORITIES v

CITATIONS OF PRIOR OPINIONS 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. FACTS RELATED TO SUFFICIENCY OF THE EVIDENCE ON COUNT ONE 2

1. Wire Fraud 2

2. Obstruction of Justice 7

3. Securities Fraud 10

B. FACTS RELATED TO ON COUNTS TWO, THREE, AND SIX 10

C. FACTS RELATED TO COUNT THIRTEEN 11

ARGUMENT 12

1. Did the District Court and the Court of Appeals err in finding a single wire fraud conspiracy charged in the indictment when the Government proved three separate and distinct conspiracies creating a material variance resulting in a violation of the Fifth Amendment's guarantee that Petitioner must be tried on the indictment returned by the Grand Jury? 12

2. Did the District Court and the Court of Appeals err by not perceiving Petitioner's Fifth Amendment Due Process claim that his conduct relating to Counts Two, Three and Six was within the legal and ethical boundaries permitted by law; this issue was raised below only in terms of insufficiency of the evidence, not as a Constitutional deprivation arising out of a failure to properly instruct the jury although trial counsel failed to request a specific instruction? 17

A. Count Three of the Indictment. 17

B. Count Six of the Indictment. 19

C. Count Two of the Indictment. 23

3. Did the District Court and the Court of Appeals err by denying Petitioner's claim that 18 U.S.C. § 1623(a) was improperly applied as a matter of law, since the examiner's questions were fundamentally ambiguous as a matter of law and Petitioner's answers were literally true? 26

A. The examiner's questions were fundamentally ambiguous and insufficient as a matter of law to support a conviction for making a false statement. 27

B. Gormley's answers to the examiner's question were literally true and cannot support a perjury conviction. 29

CONCLUSION 30

APPENDIX ..... A-i

TABLE OF AUTHORITIES

Page(s)

Cases

Anastasoff v. U.S.,
67 Cr. Law Rptr. 21 (8th Cir. Aug. 22, 2000) 20

Bronston v. U.S.,
409 U.S. 352, 93 S.Ct. 595 (1973) 27, 29, 30

Carpenter v. U.S.,
484 U.S. 19, 98 L.Ed.2d 275,
108 S.Ct. 316 (1987) 17, 18

Kotteakos v. U.S.,
328 U.S. 750, 66 S.Ct. 1239 (1946) 12, 14, 15, 16

U.S. v. Camile,
519 F. Supp. 1238 (E.D.Pa.1981), affirmed,
689 F.2d 31 (3d Cir.1982) 13, 14, 15

U.S. v. Campbell,
977 F.2d 854 (4th Cir.1992), cert. denied,
507 U.S. 938, 113 S.Ct. 1331 (1993) 19, 20

U.S. v. Coward,
630 F.2d 229 (4th Cir.1981), cert. denied,
456 U.S. 946, 102 S.Ct. 2014 (1982) 12

U.S. v. DeLucca,
630 F.2d 294 (5th Cir. 1980), cert denied,
450 U.S. 983, 101 S.Ct. 1520 (1981) 25

U.S. v. Earp,
812 F.2d 917 (4th Cir.1987) 29

U.S. v. Escobar DeBright,
742 F.2d 1196 (9th Cir. 1984) 25

U.S. v. Heaps,
39 F.3d 479 (4th Cir.1994) 19-20

U.S. v. Heater,
63 F.3d 311 (4th Cir.1995) 28, 29

U.S. v. Kelly,
888 F.2d 732 (11th Cir. 1989) 25

U.S. v. Kennedy,
32 F.3d 876 (4th Cir.1994) 12

U.S. v. Lieberman,
106 F.3d 393 (4th Cir) 20, 21, 22

U.S. v. Machi,
811 F.2d 911 (7th Cir. 1987) 25

U.S. v. McDougald,
990 F.2d 259 (6th Cir. 1993) 20

U.S. v. O'Hagan,
92 F.3d 612 (8th Cir.1996),
rev'd on other grounds,
521 U.S. 642, 117 S.Ct. 2199 (1997) 19

U.S. v. Rendon-Marquez,
79 F. Supp. 2d 1361 (N.D.Ga.1999) 27, 28

U.S. v. Sielaf,
615 F.2d 402 (7th Cir. 1979), cert. denied,
446 U.S. 940, 100 S.Ct. 2163 (1980) 25

Statutes

18 U.S.C. § 1621 27

18 U.S.C. § 1623 29

18 U.S.C. § 1623(a) 1, 26, 30

18 U.S.C. § 1956(a)(1)(A)(i) 19

28 U.S.C. § 1254(1) 1

Constitutional Provision

U.S. Const. amend. V ..... i, 1, 12, 17

Rules

Fed. R. Crim. P. 29(a) 2, 21

Fed. R. Crim. P. 52(c) 17

CITATIONS OF PRIOR OPINIONS

The opinion of the United States Court of Appeals for the Fourth Circuit as Appendix A and is published (U.S. v. Gormley, Op. No. 00-4406, argued March 2, 2001, decided June 7, 2001, Petition for Rehearing with Petition for Rehearing *en banc* denied July 6, 2001 (Appendix B).

JURISDICTIONAL STATEMENT

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner's first issue is whether there was a variance in Count One of the indictment since the Government proved multiple conspiracies instead of the single conspiracy alleged in violation of the guarantee provided in the Fifth (5th) Amendment to the United States Constitution: "No person shall be held to answer for a capital or other infamous crime unless on a presentment of indictment of a grand jury. . ."

Petitioner's second issue undertakes an analysis of the Due Process Clause of the Fifth Amendment of the United States Constitution in relation to an attorneys professional duty and responsibility to properly represent his client when charged with wire fraud and money laundering. The relevant portion of the Fifth Amendment reads: ". . . nor be deprived of life, liberty, or property without due process of law . . ."

Petition's third issue involves 18 U.S.C. § 1623(a): "Whoever under oath . . . in any proceeding before or ancillary to any court or grand jury of the United States makes any false material declaration shall be guilty of perjury."

STATEMENT OF THE CASE

On September 9, 1998, Petitioner was indicted in a 14-count indictment with co-defendants, Stephen Oles, Ramona Holcombe, Stanie Benz, Gary Bollin, David Raimer, Jennifer Raimer, and Ernest Tietjen. Petitioner was charged in Counts One, Two, Three, Six, Thirteen, and Fourteen.

Jury trial was held from November 2 to November 19, 1999. Oles, the creator of the scheme, failed to appear.

At the close of the Government's case in chief, Petitioner moved for a judgment of acquittal on all counts pursuant to Rule 29(a). The district court granted Petitioner's motion only on Count Fourteen.

James Gormley was a business/securities lawyer in Atlanta, and a graduate of University of Virginia Law School. He established trusts and offshore accounts for some of the participants.[1] Gormley also drafted a joint venture agreement for Bollin.

A. FACTS RELATED TO THE PROOF OF MULTIPLE CONSPIRACIES FOUND IN COUNT ONE

1. Wire Fraud

---

[1]Gormley established attorney-client relationships with Bollin, Damron, Oles and David Raimer [J.A. at 1880-1881]; he never had an attorney-client relationship with Benz, Holcombe or Tietjen. Holcombe and Benz were program managers; Bolllin a broker; and the Raimers managed Oles' Orlando bank account which distributed money at Oles' direction. Oles created the scheme and is a fugitive.

Petitioner incorporates, by footnote, a brief analysis of the indictment because Count One is so complex.[2]

---

[2]Count One comprises about 40% of the indictment. A section describing "THE MANNER AND MEANS OF THE CONSPIRACY" [J.A. at 111], contains 17 paragraphs. It also specifies 37 "OVERT ACTS". The Government was not required to delineate Count One in such detail; it is significant that the Government often uses the word "defendants" to loosely describe actions of individuals in the furtherance of the alleged conspiracy. Gormley was not a participant in paragraphs 13-15, 17-23, 26, 27, 29 and 30. Paragraph 16 claims Gormley assisted co-conspirators by setting up off-shore bank accounts and "foreign grantor trusts"; however, this representation was found by the district court to comprise legal services performed by an attorney. [J.A. 1322). Paragraph 24 attributes no specific conduct to Petitioner. However, Gormley had discussions with co-conspirators about "investors money" and with the Toumas, but these conversations were in the nature of legal services. The "joint venture agreements" and other legal documents described in paragraph 25 were also within the boundaries of legal services. Activities described in paragraph 28 do not involve Gormley except for his conversations with the Toumas in which he advised them of their right to retain counsel and file suit against Oles. OVERT ACTS "a", "b", "e", "f", "g", "h", "j", "k", "l", "n", "o", "p", "q", "r", "s", "t", "u", "v", "w", "x", "y", "z", "aa", "bb", "cc", "dd", "ee", "ff", "gg", "hh", and "jj" do not relate to Petitioner. Overt Act "c" alleges Gormley drafted a "Debenture Trading Profit Sharing Agreement". The preparation of this document was within the boundaries of legal services. Overt Act "d" alleges Gormley helped to establish a so-called "Foreign Grantor Trust". The preparation of this document was a legal service. [J.A. at 1322]). Overt Act "i" alleges Gormley was faxed wire transfer coordinates in the Turks and Caicos. The Government's evidence was not sufficient to show Petitioner had actual knowledge of this facsimile. [J.A. at 975]. Overt Act "m" claims on October 11, 1995, $400,000 was transferred to Oles' BCI account. Gormley did not participate in this transaction [J.A. at 446]. Overt Act "ii" states Gormley received a $20,000 payment from Bayshore Foundation. This is true; however, the payment was for legal fees.

Bollin, the broker, and Damron met with Petitioner on July 20, 1995 to discuss a foreign grantor trust for Damron. Damron paid a $6,500 fee to Gormley on July 20. Damron and Bollin testified only foreign grantor trusts were discussed at this meeting. They did not discuss Exodus International, Oles' investment vehicle. However, Program 39, an offering of Oles, was later discussed and Damron ultimately retained Gormley for two specific reasons: to create a foreign grantor trust and to advise Damron whether he should invest in Program 39. Damron told Gormley and Bollin the money he sought to invest was profit from selling Gold Eagle Club contracts, a business he had been in for some time. The money actually belonged to the Toumas, who invested $754,000 with Damron. They authorized $400,000 for investment into Program 39. The remaining funds purchased gold coin contracts. Petitioner had no role whatsoever in obtaining the $754,000 from the Toumas.

Gormley associated the Finbar Dempsey Law Firm in the Turks and Caicos to establish Damron's trust and split Damron's fee with them.[3] The Dempsey firm created Damron's trust, "Pharaoh". Gormley was merely their United States contact. Gormley received confirmation that Damron's account was open on August 16. Damron told Gormley he wanted the Toumas as "successor beneficiaries" of his trust because they were his "best customers". Gormley prepared a deed of trust.

Thereafter, Damron sent Program 39 literature Bollin had given him to Gormley. Gormley summarized it for Damron. Gormley told Damron, "he had never known one of these programs to pay off," and advised Damron and Bollin against the investment. Despite Gormley's advice, Damron went forward, requesting Gormley draft a joint venture agreement between him and Bollin.

On July 24, Gormley told Damron he would hold the $400,000 to be invested by Damron in escrow until he

---

[3]None of the members of the Dempsey Law Firm were named in the indictment.

received a bank guarantee and certain "due diligence" documentation from Holcombe and Oles. Gormley told Damron the bank guarantee and documentation were very important. Damron and Bollin testified when the bank guarantee and documentation were not forthcoming, Gormley absolutely refused to give Damron the "green light". Gormley never encouraged Damron to invest. There was never a bank guarantee.

In early September, Bollin hired Gormley to establish a trust, "Jennsher", for him. His legal fee was $2,000. This was the first time Bollin hired Petitioner to perform legal services. On August 1, another attorney, Robert Edwards, drafted an escrow agreement covering the $400,000. On that same day, Gormley reviewed Edwards' agreement for Damron and proposed minor revisions. Edwards faxed the final escrow agreement to Damron on August 3. The $400,000 remained in Edward's account from early August until Damron authorized its transfer to Bollin's account, Jennsher, on September 19. On August 7, Gormley drafted a Profit Sharing Agreement between Damron and Bollin again reflecting it was contingent upon receiving a bank guarantee.

On August 17, Secret Service Agent, David Caruso, met Gormley at the U.S. Attorney's Office in Atlanta on a separate matter. Gormley was not a subject or target. At the end of the meeting, Caruso mentioned warnings about "prime bank note" schemes and allegedly told Gormley the programs were fraudulent. Caruso did not use "bank debenture" terminology in this conversation."

On September 13, Oles faxed a memorandum to Holcombe providing wire coordinates for Oles' and Raimer's offshore account, BCI, so Holcombe knew where to direct the investors' money, including Damron's. This fax is the subject matter of Count Three and critical to this case Although Holcombe testified she faxed the memorandum to Gormley's law office, there is no evidence Petitioner had actual knowledge of the memorandum. The fax headers

show Exhibit 24 was faxed from Holcombe to Petitioner's law office on September 13 at 3:51 p.m; Bollin's name and fax number, without a date or time, appear on the document. Bollin obtained a copy of the memorandum, but could not recall how he obtained it. He testified he had no recollection who sent it. Damron testified Bollin faxed it to him on September 13. Significantly, neither the fax nor any testimony showed Gormley had actual knowledge of or took any action relating to Exhibit 24.

On September 18, Damron instructed Gormley to draft a new Profit Sharing Agreement with Bollin. Damron wanted the agreement changed showing he had paid Bollin $50,000 in finder's fees. Petitioner made the changes; however, he was careful to provide the Agreement was contingent upon "the satisfaction of certain conditions precedent", receipt of the bank guarantee and the due diligence documentation. This document also reflected, "Damron has introduced Bollin [sic] certain individuals who have placed U.S. $400,000 in Escrow for investment."

Damron testified that despite Petitioner's persistent refusal from August 1 until September 19 to give the "green light," he invested the $400,000. On September 19, a letter was prepared with wire instructions to Edwards to break the escrow. There is conflicting evidence about the author. Damron testified Gormley drafted and faxed it to him; Damron signed, notarized, and sent it to Edwards. But Damron testified on cross-examination he wrote the letter. Following Damron's instructions, on September 20, Edwards wired $400,000 to Jennsher (Bollin); the funds then were moved to Pharaoh (Damron), and finally to Oles' grantor trust, BCI Corp.

Damron testified Bollin became upset when Petitioner refused the "green light"; Bollin fired him around September 25th. Once Gormley was fired, Bollin suggested, and Damron agreed, that Attorney Edwards would be the escrow agent. Damron never fired Gormley, but from

September 25th to October 16th, Damron stopped consulting with him.

After investing in another debenture program with Benz, Damron testified he needed two separate trusts to avoid commingling the profits from the two programs. On November 21 Damron asked Gormley to establish a second trust account for him. Gormley set up a second trust: "Golden Leaves II", charging $2,500.00.

In January 1996, Damron invested $130,000 in another debenture program without conferring with Petitioner.

2. Obstruction of Justice

Weekly payouts for Program 39 were to begin in mid-October. When the Toumas had not received returns by December, they pressured Damron. Dr. Touma asked Damron to speak with Gormley. Damron, Dr. Touma, and Petitioner had a conference-call. During the call, Gormley commented: "I don't know that much about this particular deal (Program 39) and," "...there frequently are lengthy delays." Mrs. Touma secretly recorded the call.

After Damron's investigation in January, investors sought return of their monies. Damron instructed the Dempsey law firm to return the last $130,000. Gormley allowed Damron use of his escrow account for the return of this money.[4] Petitioner then issued checks to the persons Damron identified, sending them to Damron.

In January, Damron, and the Toumas seriously considered suing Oles. Petitioner never represented the Toumas but wrote Oles advising him the Toumas would sue if they did not receive returns by January 12th. On January 9th, Gormley, Damron, and Bollin spoke with Dr. Touma by phone. Petitioner recommended a former United States Attorney to sue Oles.

---

[4]Damron testified that about $100,000 of the $130,000 was returned. [J.A. 456].

Around October, Petitioner told Damron Oles sent Damron $100,000 to the Turks and Caicos. Damron prepared a distribution list and sent it to Gormley. Ultimately, the Dempsey law firm issued checks to Damron for delivery to investors.

Damron was indicted in January. On March 17, the district court entered an Ex Parte Restraining Order against Damron requiring him to file income and expense reports. Damron testified he faxed Gormley a copy of the order on March 17, but the order the Government introduced lacked Damron's customary notation of date and time of the fax. The Restraining Order, seized from Gormley's office during a search executed on August 4, 1998 showed Gormley received it on March 24, 1998 from a law firm which had, for a time, represented Damron. This date is nearly a year after it was filed. No other copy was found in Petitioner's office.

Bill Levine, Damron's first defense attorney, testified he and Gormley telephonically discussed the Order within a week after the court entered it.[5] But no Exhibit exists showing Petitioner received a copy of the Order or knew its contents before March 24, 1998, when Damron's second court-appointed attorney, John Laishley, faxed it to Gormley.

After Damron's indictment, Petitioner represented him in civil matters. Throughout 1997, Gormley wrote demand letters to Benz and Holcombe seeking repayment.

On April 3, 1997, Bollin called Damron stating Oles had sent him $50,000. Damron called Gormley, who suggested, while Damron could not legally receive money without reporting it to the Court, his wife could if it was loaned from Bollin's wife to Damron's wife and supported by a written promissory note. Damron did not specifically discuss the Restraining Order with Gormley at this time.

---

[5]Levine initially represented Damron from the time his office was searched until he was indicted. Later, the court appointed Ed Weis to represent Damron. Damron requested a different lawyer; John Laishley was then appointed.

Bollin sent $40,000 in cashier's checks and money orders payable to Damron's wife. Damron testified he did not report the $40,000 to the court because the restraining order affected him not his wife. Bollin only kept $10,000 for himself.

Later, Petitioner allegedly called Damron, telling him Oles had sent $100,000 to Damron. The record is silent on the call's date. Damron testified he initially requested the money by calling Petitioner, who contacted Paul Dempsey. There is no evidence Gormley instructed Dempsey to distribute the funds. Beginning on June 5, and for several weeks, Damron received $45,000 in cash in eight separate mailings. The money was taped inside a Dempsey Firm brochure. After the first or second mailing, Damron called Paul Dempsey directly to obtain the money. Damron testified Petitioner discussed distribution of the funds, suggesting investors in the "second deal" be paid first to avoid further damage to Damron. Gormley told Damron that he would still face prosecution even after repaying investors. Damron and Gormely did not discuss the Restraining Order, which, according to the documentary evidence, was not received by Gormley until March 1998.

Later Petitioner advised Damron he must tell his court-appointed attorney, Ed Weis, about the $100,000. Damron followed Gormley's advice and told Weis. On August 15, 1997, Petitioner called Levine, Damron's previous attorney and told him of the $100,000. Levine testified Gormley told Damron to report the money.

About August 23, Gormley called Damron telling him $410,000 was available in the Turks and Caicos. Damron was expecting the money because Oles earlier told Damron he would send him money to repay investors. Petitioner called Levine again on August 26 or 27, telling him $400,000 was being sent to investors. Levine voiced concern the Government could construe repayment as an attempt to influence potential witnesses, telling Petitioner the money should not be returned. Gormley told Levine he

was just passing information for Oles who controlled the money and who he did not control. The Restraining Order was not mentioned in this conversation.

Once Damron learned the $410,000 was available, he asked Petitioner to help him compute repayments. On August 23, Damron faxed Gormley a list of investors in the "second deal," including addresses and amounts, and asked him to forward it to Dempsey. Gormley refused to send it and strongly advised Damron against it. Petitioner told Damron he did not want to hear any more about Damron sending the list to Dempsey. Damron testified he did not discuss this further with Gormley. Nevertheless, in September 1997, investors in West Virginia received manila envelopes from Turks and Caicos containing bank drafts refunds.

3. Securities Fraud

Initially, the Government conceded there were no securities fraud violations against Petitioner. AUSA Frail stated, "I spoke with Mr. Wright (lead AUSA), and . . . there is no allegation [of] security fraud against Gormley,. . ." U.S. Attorney Rebecca Betts interjected, ". . . there is . . . factual support that Gormley was making an offer of a security, [the] Bosnia Troop Deal." The district court emphasized the Bosnia Troop evidence was admitted as similar act evidence and was not covered by the indictment. This was the only scintilla of securities fraud evidence offered against Petitioner.

B. FACTS RELATED TO ON COUNTS TWO, THREE, AND SIX[6]

[6]Counts Two, Three, and Six charge Gormley with conspiracy to commit money laundering, wire fraud, and money laundering respectively.

The facts relevant to Counts Two, Three and Six are set forth in Petitioner's Count One fact recitation.

C. FACTS RELATED TO COUNT THIRTEEN

On October 23, 1997, the district court, in Damron's case, held a contempt hearing on whether Damron violated his Restraining Order by transferring assets without the Court's permission.[7] Gormley allegedly testified falsely at Damron's contempt hearing:

> Q: And what is your understanding as to those disbursements and how they occurred?
>
> A: And I believe that those are the bank drafts that these individuals received. And from everything I know, that money was not Mr. Damron's money, he didn't own it, he didn't control it.
> And I don't know what this word "expectancy interest" is in the Court's order, exactly what that means, but I don't believe that Mr. Damron had any such interest in that money.
>
> Q: Did Roger A. Damron direct or coordinate or orchestrate the disbursement of these funds to these individual investors?
>
> A: To my knowledge, he did not.

---

[7]The crucial inquiry was Damron's involvement in repaying nearly $400,000 to various people who had invested in Exodus International's debenture trading programs.

ARGUMENT

1. **Did the District Court err in finding a single wire fraud conspiracy charged in the indictment when the Government proved three separate and distinct conspiracies creating a material variance resulfing in a violation of the Fifth Amendment's guarantee that Petitioner must be tried on the indictment returned by the Grand Jury?**

A "variance" occurs when the trial evidence establishes facts materially different from those alleged in the indictment. U.S. v. Kennedy, 32 F.3d 876, 883 (4th Cir.1994). In a conspiracy prosecution, a defendant may establish the existence of a material variance by showing the indictment alleged a single conspiracy but the Government's proof established multiple, separate conspiracies. Kotteakos v. U.S., 328 U.S. 750, 755-56, 66 S.Ct. 1239 (1946). A variance mandates reversal of conviction when it prejudices a defendant's substantial rights. Kennedy, supra at 883. Prejudice must be actual. A defendant demonstrates actual prejudice by showing the jury was confused by imputing guilt to members of one conspiracy because of the illegal activities of the other conspiracy (the spillover effect). U.S. v. Coward, 630 F.2d 229, 231 (4th Cir.1981), cert. denied 456 U.S. 946, 102 S.Ct. 2014 (1982).

Where the charge is a single conspiracy but the evidence showed a series of separate unconnected conspiracies, apart in time and differently peopled there is a variance. Kotteakos, supra at 755. In Kotteakos, the Government charged 32 defendants in a single conspiracy to obtain fraudulent loans from the FHA. The only person common to all the transactions was Brown, who acted as a broker to the others, assisting in making false and fraudulent applications. While Brown was the instrument in each instance for obtaining the loans, the eight groups had no connection with each other. The total life of the conspiracy was not detailed, but Kotteakos' loans were

submitted only one month apart. This Court found the evidence showed distinct conspiracies, at least eight, rather than a single conspiracy.

There cannot be a common purpose or plan in connecting the activities of several persons to a single enterprise where members of the core group have goals that rival those of other members of that group. U.S. v. Camiel, 519 F.Supp. 1238, 1244 (E.D.Pa.1981), affirmed U.S. v. Camiel, 689 F.2d 31 (3d Cir.1982). The Government alleged that four defendants and other unindicted co-schemers participated in a single mail fraud scheme from December 1974 to December 1978. Id. at 34. The scheme involved hiring "no show" employees, Democratic party loyalists placed on the Pennsylvania House and Senate payrolls, even though they did no work for the state legislature. The defendants were Camiel, Chairman of the Philadelphia Democratic County Executive Committee, Fumo, Nolan, and Scarcelli. As chairman, Camiel was the key person for recommending applicants for the "no show" positions. Fumo was Camile's assistant in charge of patronage. Id. 34, 36. Nolan supervised the Senate payroll and Scarcelli was in charge of the House payroll. Each exercised independent control over his respective payroll account and neither one knew of the other's activities. The government then proved after defeating Camiel in a bitter election, Camiel's sucessor, Weinberg, immediately fired all "no-show" employees. Id. 36, 37. Two months later Weinberg, an unindicted co-schemer, hired his own "no show" employees. The testimony showed the alleged co-conspirators had rival goals. The court found there was a variance between the indictment's allegations and the evidence produced at trial; it then concluded that the defendants' substantial rights were prejudiced. The Circuit Court reached its decision because of the massive volume of evidence (37 witnesses for the Government), the number of conspiracies actually proven (four), and individual witness testimony proving multiple conspiracies. The Court found substantial prejudice

resulted from specific government evidence the defendants were unfairly linked with Henry Cianfrani, a state senate majority leader separately convicted in a highly publicized political corruption trial. Id. 1244-45.

Here, in Count One, the indictment alleged eight named defendants and Damron, an unindicted co-conspirator entered into a single conspiracy to commit wire fraud, securities fraud, and obstruction. Petitioner's conviction of Count One suffers from the same variance found in Camiel, and Kotteakos. supra, because the Government proved at least three different conspiracies instead of one. Bollin, Holcombe, Benz, Damron, and Oles conspired to offer and market securities through offshore trading to investors; Bollin, Holcombe, Oles, Benz, the Raimers, and arguably Gormley engaged in a wire fraud conspiracy, but the conspiracy to obstruct justice, if such existed, involved only Damron, Gormley, Bollin and Oles. But, Damron, Gormley and Bollin were constantly feuding with Oles; and Bollin fired Gormley.

Clearly, Petitioner did not participate in a conspiratorial agreement to offer or market a security interest (securities fraud objective) in Program 39 or any offshore program to any investor. Damron testified Gormley played no part in pitching Program 39 to the Toumas. [J.A. 440] Dr. Touma first spoke with Petitioner well after Touma had given Damron the investment money. Likewise, the Government virtually conceded at trial it did not allege any securities fraud against Gormley. There was no evidence that David or Jennifer Raimer or Ernest Tietjen offered any offshore trading program to anyone. Thus, the Government's proof shows different conspiracies peopled differently, not a single conspiracy.

Requiring more analysis is the Government's inclusion of obstruction of justice as an object of the conspiracy. Once the profits of the scheme were not realized at the end of 1995, and especially after Damron was indicted in February 1997, the overt hostility between Damron,

Gormley, and Bollin on one side and Oles on the other, makes their joint participation in a single scheme to obstruct justice implausible. And, Bollin fired Petitioner to further complicate this issue. The Government produced no evidence Tietjen, Holcombe, or Benz were in any way involved with obstruction by returning funds to West Virginia investors or directing money to Damron after December 1995. Tietjen, Holcombe, and Benz had little, if any, knowledge of the rivalry between Oles and Damron, Gormley and Bollin.

Clearly, the defendants' objectives were not the same. And Gormley's role as a practicing lawyer further confuses the conspiratorial agreement alleged in Count One. Each legal service Gormley performed was often an end in itself, unrelated to the purposes of other co-conspirators. When Petitioner performed legal services, such as creating a foreign grantor trust, drafting a joint venture agreement, or adding beneficiaries to a trust, upon completion of the legal service, his role ended. There is lack of evidence showing he had knowledge of any single conspiracy. This case is not unlike Camile, supra, at 42, 43, where the multiple conspiracies were separated in time and differently peopled. The mere fact certain persons appear in both conspiracies does not ipso facto make a multiple conspiracy one conspiracy. See Kotteakos, supra (role of Simon in each of the multiple conspiracies).

Finally, if there was a separate securities fraud and obstruction conspiracy, the wire fraud objective must also be a single conspiracy. The Government's conspiratorial evidence at trial created a material variance. Petitioner now addresses the prejudice issue.

The indictment states the alleged single conspiracy had three objectives: security fraud, wire fraud and obstruction of justice. As shown, each of the objectives were really individual conspiracies, not participated in by all of the defendants. Substantial prejudice occurs because of the spillover effect created by the variance. The Government

took a great risk in simply alleging all defendants joined a single conspiracy when the evidence showed that because of the disagreements and other antagonistic factors just reviewed, there were defendants who did not participate in any purported obstruction of justice, while others, particularly Petitioner, had nothing to do with securities fraud. Gormley, as an attorney, is hopelessly trapped by the general language of the indictment and the spillover of the evidence. It is tempting for the Government to allege a single conspiracy and then paint with a broad brush hoping to ensnare all the defendants, particularly a lawyer defendant. The jury then becomes hopelessly confused and is tempted to sweep all the defendants into the alleged single conspiracy, although the proof has shown multiple conspiracies. Substantial prejudice is a direct by-product of this prosecutorial failure of proof.

Since Kotteakos, supra, this court has closely examined the governments expanding use of multiple conspiracies to prove a single charged conspiracy. The Fifth Amendment requires a new examination of the variance issue in the context of white collar cases. Because the Government failed to prove the conspiracy charged in Count One, this Court should reverse and vacate the conviction.

2. **Did the District Court err by not failing to instruct the jury that Petitioner's conduct as a lawyer, if within the legal and ethical boundaries permitted by law, was a defense to Counts Two, Three and Six; failure to so instruct the jury violated the Due Process Clause of the Fifth Amendment?**

A. Count Three of the Indictment.[8]

A "scheme to defraud is" any scheme to deprive another of money or property by means of false or fraudulent pretenses, misrepresentations or promises. Carpenter v. U.S., 484 U.S. 19, 27, 98 L.Ed.2d 275, 108 S.Ct. 316 (1987). Count Three alleges that Petitioner knowingly transmitted by wire communication a memorandum bearing the heading "Exodus International", dated September 13, 1995, which furnished wire coordinates for investors to send funds to an "Exodus account" controlled by Oles. Allegedly, this critical memorandum was delivered by facsimile from Gormley to Damron in West Virginia. [J.A. 128-129]. The indictment does not plainly state that Gormley individually transmitted the memorandum to Damron. It vaguely claims three other defendants and Gormley, aiding and abetting each other, did this act.

The evidence does not prove Gormley caused to be or transmitted Exhibit 24 to Damron. Although Holcombe testified she faxed the memorandum to Gormley's office, there is no evidence Petitioner had knowledge of or saw it. [J.A. 975] The facsimile headers show Exhibit 24 faxed from Holcombe to Gormley's office on September 13 at 3:51 p.m. The headers also show Bollin's name and fax number, without a date or time. Bollin apparently obtained a copy of it, but he testified he could not recall how he received it. [J.A. 1086-87] He repeatedly testified he had no recollection

[8]This issue was raised below only in terms of sufficiency of the evidence. The jury instruction was not requested on each count. Therefore, this question would be reviewed for plain error under U.S. v. Olano, 507 U.S., 725, 113 S.Ct. 1770; Fed. R. Crim. P. 52(c).

who sent him Exhibit 24. Bollin did not testify he received the fax from Gormley, and no one testified Petitioner faxed Exhibit 24 to him or her. Damron testified Bollin faxed the memo to him on September 13, 1995. [J.A. 315] Neither the fax nor any testimony showed Gormley took any action relating to it. Gormley practiced law in a space-sharing arrangement with six other lawyers. There were numerous support personnel working there. [J.A. 1906-07] The evidence was insufficient for any reasonable juror to find beyond a reasonable doubt Gormley transmitted Exhibit 24, or had actual knowledge of it. Thus, the Government failed to pin critical Exhibit 24 on Petitioner.

Additionally, examining the elements of this offense, the Government did not prove as of September 13, 1995, Petitioner possessed the necessary knowledge or criminal intent to join the scheme to defraud the Toumas, because the evidence showed he did not know the Toumas were the source of money to be invested in Exodus Program 39. Although a scheme to defraud investors may have existed on September 13, 1995, Petitioner did not knowingly participate in that scheme because Damron told him that the $400,000 was his money. Thus, Gormley did not share with Damron or others any intent to defraud the Toumas. Moreover, Damron's undisputed and unequivocal testimony at trial that Petitioner absolutely refused the "green light" to invest in Program 39 defeats the Government's contention that Petitioner intended to defraud anyone, including the Toumas, Bollin, and Damron. Because the Government failed to prove: (1) Gormley knew the Toumas gave Damron the $400,000 and (2) the Toumas gave money to Damron as a result of Damron pitching debenture programs, Gormley could not have possessed the requisite knowledge and criminal intent to commit wire fraud charged in Count Three. Petitioner simply acted as a lawyer, not a principal to wire fraud. Trial counsel did not seek a jury instruction relating to Petitioner's role as counsel;

failure of the trial court to give the instruction would have been reversible and plain error, see infra, 21-22.

B. Count Six of the indictment.

Count Six charges Gormley, three other defendants, and Damron (unindicted in this case), with knowingly conducting and causing to be conducted a financial transaction involving the proceeds of specified unlawful activity ("SUA"), wire fraud, by causing $400,000 to be wired from a financial institution in Atlanta to an account controlled by Bollin in the Turks and Caicos. [J.A. at 134] Petitioner did not make the wire transfer. This was done by Robert Edwards, who was holding funds in escrow. Petitioner did not direct Edwards to release the escrow. Damron had complete control over the account and did not tell Gormley he had ordered the funds released.

Where an indictment specifically defines the predicate unlawful activity that gives rise to a money laundering charge, and a defendant's conviction on the "SUA" Count is overturned, the court must also reverse the substantive money laundering conviction. U.S. v. O'Hagan, 92 F.3d 612, 628 (8th Cir.1996), reversed on other grounds, 521 U.S. 642, 117 S.Ct. 2199, (1997).

In order to sustain a conviction under 18 U.S.C. § 1956(a)(1)(A)(i), the Government must prove: (1) the defendant conducted a financial transaction with at least a de minimis effect on interstate commerce; (2) the transaction involved the proceeds of a specified unlawful activity[9]; (3) the defendant knew the proceeds were derived from that specific unlawful activity; and (4) the defendant engaged in the transaction intending to promote that unlawful activity. To satisfy the third element, the Government must prove beyond a reasonable doubt that the Petitioner had actual subjective knowledge that the $400,000 involved proceeds from illegal activities. U.S. v. Campbell, 977 F.2d 854, 857

---

[9]Element (1) is uncontested and (2) has been addressed.

(4th Cir.1992), cert. denied 507 U.S. 938, 113 S.Ct. 1331, (1993). Generally, one cannot be convicted based on what one should have known. Id.; see also U.S. v. Heaps, 39 F.3d 479, 484 (4th Cir.1994). Actual subjective knowledge is required and can be found if the defendant was aware to a high probability of the true nature of the transactions and deliberately chose to avoid finding the truth for fear the true nature would be revealed. Such "willful blindness" extends the reach of the actual subjective knowledge requirement. Campbell, supra, 857. Nevertheless, the Government failed to prove the third element.

When an attorney performs routine legal services for a client with funds derived from "SUA", but has no knowledge that the client is engaged in any wrongdoing, the evidence will not support a verdict that the attorney had actual knowledge (or was willfully blind) of the illegal source of the funds. U.S. v. Lieberman, 106 F.3d 393, (4th Cir.)(unpublished [10]. See also, U.S. v. McDougald, 990 F.2d 259, 263-264 (6th Cir. 1993) In Lieberman, a pivotal opinion, the jury convicted the attorney of conspiracy to commit money laundering in connection with his six-year representation of Ecker, a drug dealer. Lieberman performed routine legal services for Ecker, preparing his personal income tax returns, advising him on investments, and negotiating business deals. Ecker never revealed the money to pay taxes, fund business ventures, and pay Lieberman's fees came from drug sales. The Government suggested, because Lieberman negotiated six-figure deals for Ecker, while simultaneously reporting his income as ranging from $34,000 to $74,000, and because Ecker told others about his drug dealing, Lieberman knew or was willfully blind to Ecker's illegal activities. The Circuit found

---

[10]Although Lieberman is unpublished, the case is cited because it involves the reversal of a money laundering conviction of a lawyer. It is analogous to the instant case, and its reasoning applies to Counts Two and Three. See Anastasoff v. U.S., 67 Cr. Law Rptr. 21, pg. 711 (8th Cir. Aug. 22, 2000) where the Court recognized that all cases whether published or unpublished should be recognized as precedent.

there was nothing in the evidence for Lieberman to deliberately ignore that would support the jury's finding he was willfully blind: "We know of no and the Government has suggested no requirement that a lawyer . . . must know from where a client's money comes. Hence, concluding knowledge from merely not asking is out right speculation." At 5.

Petitioner was not the only lawyer in this case. Robert Edwards testified he deposited $400,000 into his checking account and disbursed it to the Turks and Caicos. Edwards was not indicted. With regard to the $400,000 transfer, Petitioner was deceived by Damron as to the source. Gormley had every reason to believe the money belonged to Damron. In this context, there was nothing for Gormley to ignore. Like Lieberman, he was led down the path by the malevolent intentions of clients not his own wrongdoing. As the Circuit said in Lieberman, and it applies here: "Therefore, while the instruction on willful blindness may have been correct, the evidence to support it was wholly lacking." [At 5-6] Again, no instruction on the role of an attorney conducting routine legal business was requested by Petitioner's trial counsel. To see the deficiency in the government's position, an examination of portions of the Rule 29(a) arguments is instructed.

The Government relied on certain key evidence to oppose Petitioner's Rule 29(a) Motion. But it did not establish as of September 19, 1995, the date $400,000 was transferred from Edward's escrow to the Turks and Caicos, Gormely knew or was willfully blind to the facts that (1) Damron solicited investors for Program 39, and (2) the Toumas gave Damron the $400,000 in response to his pitch.

The Government first relied on its Exhibit 18, the July 25, 1995 letter written by Gormley to Damron wherein Petitioner (1) acknowledged Damron's desire to make Toumas successor beneficiaries of his foreign grantor trust, and (2) detailed steps he would take to protect what he believed was Damron's $400,000 investment. [J.A. 1958]

Gormley's discussion of both subjects in a single letter written four days after his initial meeting with Damron does not prove Gormley knew the $400,000 was connected with the Toumas. In fact, the structure and context of the letter shows Petitioner considered the two services, creating a foreign grantor trust with successor beneficiaries and advising Damron on Program 39, to be distinct endeavors. The "investment matter" is mentioned in the final paragraph of the letter, separate from his discussion about Dr. Touma. The district court characterized Exhibit 18 as merely an expression of "Damron's desire to create a legacy for the Toumas" and stated that it "did not create an inference that the $400,000 belonged to the Toumas." [S.J.A. 69] But if this letter can be said to connect the Toumas with the $400,000, it does not establish that the Toumas were solicited to give $400,000 to invest in Program 39. The trial court concluded it was "not clear from the evidence that Petitioner was told by Damron that Damron was making this pitch in the debenture program to the Toumas." [S.J.A. 67] In fact, Damron told Petitioner the Toumas had been his best gold coin customers for at least two years, and Gormley concluded that justified them as beneficiaries.

Second, the Government pointed to Damron's testimony that the reason he needed his own foreign grantor trust was because he would be investing client's money in the debenture programs and wanted to be in control of the returns. [J.A. 294-295] Although Damron gave this testimony, he did not testify he told Petitioner that was the reason he wanted to setup a foreign grantor trust. The district court recognized this important distinction at the JNOV hearing and the Government conceded Damron never offered such testimony. [S.J.A. 61] On re-direct, Damron admitted the Toumas put up the money for the first debenture trading program, but, again, Damron did not testify Gormley knew. [J.A. 545-546] Again, Gormley's actions were the legitimate functions of a lawyer, much like those in U.S. v. Lieberman, supra. His conviction, based on

his legitimate role as a lawyer, violates due process. At the very least the jury should have been instructed on this defense.

Third, the Government relied on Exhibit 25, which, on its face does not supply the needed requisite knowledge. [J.A. 1978-1979] This is a "Debenture Trading Profit Sharing Agreement", dated September 18, 1995. It does not identify the Toumas as being the "certain individuals who have placed U.S. $400,000 in Escrow for investment." It certainly did not suggest to Gormley that Damron fraudulently obtained the money. Even if Gormley knew, (not conceded) the money was not Damron's, he is required to know Damron obtained it by fraudulent means. Exhibit 25 does not state how Damron obtained it. It does not prove it was taken from investors who were pitched the Exodus 39 program.

Fourth, the Government offered testimony to prove Petitioner drafted Exhibit 27, a September 19, 1995 letter with wire instructions directing attorney Edwards to move the money offshore. [J.A. 1980] However, there was no evidence when Petitioner allegedly drafted the letter, or if on September 19, 1995 he knew the $400,000 was proceeds of "SUA". Importantly, Damron testified on cross-examination he wrote Exhibit 27 to Edwards. [J.A. 520]

Petitioner undoubtedly was practicing law, albeit in mucky waters, but Due Process must protect his right to represent his clients in a legal manner. Again, the jury was not instructed on Petitioner's main defense.

C. Count Two of the indictment.

If Petitioner's conviction for substantive money laundering is reversed, so must his conviction for conspiracy to commit money laundering. The district court instructed the jury the Government had the burden of proving beyond a reasonable doubt that Gormley had knowledge the money involved in the transaction was the

proceeds of some form of "SUA". [J.A. 1183]. This the Government failed to do.

In addition to the general pattern money laundering language used in this count, the Government incorporated twenty-one overt acts from the wire fraud conspiracy in Count One allegedly showing Petitioner conspired with other defendants to commit money laundering. Gormley has responded, in part, to his role in the overt acts in footnote 2, supra, at 2-3. The factual arguments made by Gormley from Count Six are also incorporated here.

In hearing argument on Count Two following the filing of the JNOV motion, the district court noted it was not clear that Gormley was told by Damron that he was making a pitch to the Toumas. The district court pointed out assuming Gormley knew the Toumas were beneficiaries of Damron's trust, the significance of this factor is lost since the Toumas' rights mature only upon Damron's death. [S.J.A. 69]

The Government has suggested Petitioner engaged in delaying tactics designed and intended to lull investors into inaction. However, an examination of the overt acts of Count One incorporated in Count Two, do not reflect lulling activities, except for the allegation in "KK" that Gormley allegedly played a role in the repatriation of the $400,000 to investors. But, the factual evidence established at trial demonstrates that Gormley, according to Damron, had little or nothing to do with the return of these funds. Indeed, Gormley told Damron not to repatriate the funds.

Petitioner's actions, claimed by the Government to have lulled investors, did not facilitate the "SUA" or conceal proceeds of the "SUA". If the Government's proof on Count Six fails, then the Government would have to show Petitioner was involved in some other financial transaction satisfying the purposes of one of the three "objects" set forth in Count Two. This the Government did not do. Its conviction denied Petitioner due process as he was merely

carrying out what he reasonably believed to be the legal and ethical practice of law.

Perhaps the leading analogous case supporting Petitioner's right to a jury instruction on his role as a lawyer is U.S. v. Escobar De Bright, 742 F.2d 1196, 1201-02 (9th Cir. 1984). It likewise applies to Counts Two and Three. De Bright was charged with multiple conspiracy and substantive counts. She claimed the trial court erred in refusing to instruct the jury she could not be found guilty if the jury found she conspired only with a government agent. The instruction was requested in the judge's chambers but was not given. The Circuit held De Bright was entitled to an instruction concerning her theory of the case if supported by law and some foundation in the evidence, citing U.S. v. Sielaf, 615 F.2d 402, 403 (7th Cir. 1979), cert. denied 446 U.S. 940, 100 S.Ct. 2163, (1980): "The general principle is well established. . . even though the evidence may be weak, insufficient, inconsistent or of doubtful credibility." De Bright held the failure to give such an instruction to be reversible.

The record in this complex case is replete with what, on its face, is lawful advice given by Petitioner to clients. Gormley's drafting of trust documents and profit sharing agreements are entirely lawful. His advice to Damron that he would not give the "green light" to certain key conduct is clearly lawful and exculpatory. But no instruction was requested by trial counsel and none was fashioned by the court. The relevance and importance of a lawyers' professional conduct was recognized in U.S. v. Kelly, 888 F.2d 732, 744 (11th Cir.1989): "We have previously noted the relevance of ethical and professional standards of behavior for lawyers in evaluating criminal intent, see U.S. v. DeLucca, 630 F.2d 294, 301 (5th Cir. 1980), Cert. denied 450 U.S. 983, 101 S.Ct. 1520 (1981)" See also U.S. v. Machi, 811 F.2d 911, 999-1000 (7th Cir. 1987).

De Bright, supra, and Kelly, supra, demonstrate that this type of instruction failure cannot be harmless and must

be plain error effecting Petitioner's substantial right to due process and a fair trial being able to convey his lack of criminal intent to the jury. Olano, supra. This issue appears to be present a matter of first impression for this court.

3. **Did the District Court err by denying Petitioner's claim that 18 U.S.C. § 1623(a) was improperly applied and as a matter of law, since the examiner's questions were fundamentally ambiguous and Petitioner's answers were literally true as a matter of law?**

Count Thirteen is based on Damron's actions relating to repayment of $400,000 to his clients in West Virginia and Gormley's testimony at Damron's contempt hearing about Damron's role in the repayment. This hearing occurred after Damron was indicted and before Gormley's indictment; Damron's conduct relating to the $400,000 refund was challenged by the Government. It is significant that the questioner was not an Assistant United States Attorney, but a private lawyer (representing a group of investors) who the court permitted to examine Gormley. At that hearing, Gormley testified. See propounded questions supra, 9-10.

The evidence, as a matter of law, does not show Gormley knew Damron, took any action to initiate the return of money. Even if this Court could find some sufficient evidence of Petitioner's knowledge of Damron's actions, the questions asked were fundamentally ambiguous and compound as a matter of law. Finally, if the court finds the questions were unambiguous, Petitioner's answers were literally true.

In August, after Damron learned Oles sent money to the Dempsey firm to repay investors, he sent Gormley a package containing names and amounts due each investor. [Exhibit 66]. Immediately after Petitioner received this, Damron asked him to send the list to Dempsey. Damron testified Gormley refused. Petitioner cautioned Damron not to forward the list. [J.A. 487-488] Damron testified he and

Gormley had no further discussions about the list after Gormley's warnings. At that point, as far as Petitioner knew, Damron had followed his advice. When money was later mailed to Damron's clients, Petitioner did not believe Damron played any part in the refund because he told Damron not to mail the funds; thus Petitioner's answer that to his knowledge, Damron did not direct or coordinate or orchestrate the repayment was not knowingly false.

Petitioner's knowledge of Damron's role in the repayment cannot be inferred from the "damage control" conversation they had where Gormley allegedly told Damron investors from the "second deal" should be repaid before the Toumas. [J.A. 407] Damron explicitly testified that conversation took place concerning another $100,000 payment that was sent in increments directly to Damron's home. Damron was not able to date this conversation, but other evidence established Damron received the $100,000 in June 1997. [J.A. 396-398] Thus, the conversation occurred at least three months before investors received checks from the $400,000 repayment distributed by the Dempsey firm. Therefore, Gormley's suggestion, in June 1997, that Damron repay the "second deal" ($100,000) investors first, does not show Gormley knew Damron directed or controlled the repayment ($400,000) of other persons three months later.

A. The examiner's questions were fundamentally ambiguous and insufficient as a matter of law to support a conviction for making a false statement.

"Precise questioning is imperative as a predicate for the offense of perjury." Bronston v. U.S., 409 U.S. 352, 362, 93 S.Ct. 595 (1973)(interpreting 18 U.S.C. § 1621).

A defendant cannot be convicted of making a false statement where the question at issue asked two separate and distinct questions, and the defendant's answer was truthful as to one part of the question See, U.S. v. Rendon-Marquez, 79 F.Supp.2d 1361 (N.D.Ga.1999), where the court

granted the defendant's motion for acquittal for making a false statement on his INS Form N-445. Id. at 1362: "Have you knowingly committed any crime or offense, for which you have not been arrested; or have you been arrested, cited, charged, indicted, convicted, fined, or imprisoned for breaking or violating any law or ordinance?" Id. Although the defendant had been arrested, he answered "no" to this question, which bears a striking similarity to the disjunctive and confusing query posed to Gormley.

Compound questions have been questioned in U.S. v. Heater, 63 F.3d 311, 327 (4th Cir.1995). There, John, a co-appellant, challenged a perjury conviction based on two alleged false declarations he had made to the grand jury regarding his use of marijuana and his involvement with McCoy. While the Circuit found John's statements to be deliberately false, it analyzed John's claim that the question whether he had ever bought or sold marijuana was a "misleading double question" that should have been stricken from the record. There is much similarity between the witness' poorly formed question and the questions posed to Gormley. [J.A. 148]

An examination of the first Gormley question shows he did not completely understand it: "And I don't know what this word "expectancy interest" is in the Court's order, exactly what that means . . . " The attorney questioning Gormley should have followed this ambiguous answer with a clarifying question. This Court must also consider that the questioner was not the Assistant United States Attorney responsible for bringing the contempt action, but a civil practitioner given special permission to appear for the investors.

The second question propounded to Gormley also suffers from lack of precision. The questioner asked Gormley a triple disjunctive compound question whether Damron "directed", "coordinated", or "orchestrated" the disbursement of funds to investors. Gormley's answer, "[T]o my knowledge, he did not.", is, at best, vague. The

questioner could not have known from the answer whether Gormley was responding to all three parts of the question, asked in the disjunctive, or just one or two parts of the question. Significantly, all three key words, direct, coordinate and orchestrate have different definitions and become particularly confusing when used in the same sentence. Thus, the question and answer were ambiguous violating the criteria in U.S. v. Heater, supra.

B. Gormley's answers to the examiner's question were literally true and cannot support a perjury conviction.

A perjury conviction cannot be based upon evasive answers or even on misleading answers so long as they are literally true. In the face of evasive or misleading answers, it is the questioner's duty "to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination." Bronston, 409 U.S. at 358-359; see also U.S. v. Earp, 812 F.2d 917, 919 (4th Cir.1987) (applying Bronston to 18 U.S.C. § 1623).

An examination of the first Gormley question shows the answer was literally true, even though not completely responsive. Since Gormley stated he did not understand the words "expectancy interest", the remainder of his answer, in context, can only be understood as literally true since there is no way to ever know how Gormley finally defined "expectancy interest" in his own mind and whether he defined it differently than the way he used the words "interest in that money" in the last sentence of his answer. And, further distorting the inquiry, the prosecutor was not in control; the torch had been passed to a lawyer for the civil litigants.

Gormley's answer to question two was also literally true. Gormley could have reasonably interpreted the words "direct", "coordinate" or "orchestrate" to mean initiate or control. In fact, Oles furnished the $400,000 and used the

Dempsey Firm to make the repayment possible. Repayment was motivated by Oles, and the money was in his possession. Gormley's conversation with Bill Levine (a lawyer representing Damron in his criminal case) further illustrates that Oles arranged repayment. Gormley called Levine on August 26 or 27, 1995, telling him that $400,000 was going to be sent to pay Damron's investors. [J.A. 633]. Levine voiced his objection to this; Gormley told Levine that he was just passing information on, Oles controlled the money, and he had no control over Oles. [J.A. 634. 636; 639-640]. Gormley believed that Oles was responsible for the repayment and in fact he was. Thus, Gormley's response to this question was literally truthful, although it may not have been completely responsive. But that was the fault of the questioner not the respondent. The Supreme Court in Bronston, supra, held that clarity and specificity are required from the questioner; otherwise, the remedy cannot be a perjury prosecution.

CONCLUSION

Petitioner requests this Court find there was a material variance as to Count 1; a Due Process violation as to Counts 2, 3, and 6; and a statutory application error by the District Court in not finding a violation of 18 U.S.C. § 1623(a). Therefore, this case should be reversed and remanded for a new trial.

Respectfully Submitted,

Mark J. Kadish, Esquire
Counsel for Record
State Bar of Georgia No. 405750
5525 Cross Gate Court
Atlanta, Georgia 30327
(404) 252-7799
(404) 252-3040 (fax)

TABLE OF CONTENTS
Appendix to the Petition

Page

Published Opinion of the
United States Court of Appeals for the
Fourth Circuit
entered September 19, 2001 ..... A-1

Order of
United States Court of Appeals for the
Fourth Circuit
Re: Petition for Rehearing
entered July 6, 2001 ..... B-1

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Nos. 00-4337(L)
(CR-98-152)

United States of America,

Plaintiff - Appellee,

versus

Gary D. Bollin, et al.,

Defendants - Appellants.

Filed: September 19, 2001

ORDER

The court further amends its opinion filed June 7, 2001, and amended September 6, 2001, as follows:

On page 21, first full paragraph, line 11 -- the court information for United States v. Fulbright is corrected to read "(5th Cir. 1986)."

For the Court - By Direction
/s/ Patricia S. Connor

Clerk

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Nos. 00-4337(L)
(CR-98-152)

United States of America,

Plaintiff - Appellee,

versus

Gary D. Bollin, et al.,

Defendants - Appellants.

Filed: September 19, 2001

ORDER

The court grants the unopposed motion for publication and amends its opinion filed June 7, 2001, as follows:

On the cover sheet, section 1 -- "UNPUBLISHED" is changed to read "PUBLISHED."

On page 2, section 2 -- the status line is corrected to begin "Affirmed by published opinion. . . ."

On page 3 -- the reference to use of unpublished opinions as precedent is deleted.

For the Court - By Direction

/s/ Patricia S. Connor

Clerk

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 00-4337

GARY D. BOLLIN,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 00-4347

ERNST N. TIETJEN,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 00-4406

JAMES GORMLEY,
Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of West Virginia, at Huntington.
Robert C. Chambers, District Judge.
(CR-98-152)

Argued: March 2, 2001

Decided: June 7, 2001

Before WILKINSON, Chief Judge, MOTZ, Circuit Judge, and Cynthia Holcomb HALL, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

Affirmed by published opinion. Senior Judge Hall wrote the opinion, in which Chief Judge Wilkinson and Judge Motz joined.

COUNSEL

ARGUED: Jane Moran, JANE MORAN LAW OFFICES, Williamson, West Virginia, for Appellant Bollin; George A. Mills, III, Huntington, West Virginia, for Appellant Tietjen; Mark Jeffery Kadish, THE LAW OFFICE OF MARK J. KADISH, Atlanta, Georgia, for Appellant Gormley. Philip Henry Wright, Assistant United States Attorney, Charleston, West Virginia, for Appellee. ON BRIEF: Rebecca A. Betts, United States Attorney, Charleston, West Virginia, for Appellee.

OPINION

HALL, Senior Circuit Judge:

Appellants raise numerous challenges to their convictions and sentences stemming from their involvement in an investment fraud scheme and the subsequent coverup. We conclude that their challenges lack merit and therefore affirm the judgments below. We also conclude that pursuant to the Supremacy Clause, federal forfeiture law supersedes the garnishment protections that Georgia state law provides for funds in an individual retirement account.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arose out of a wide-ranging investment fraud scheme, carried out by a network of conspirators, who bilked millions of dollars from investors across the country. The investments were programs that promised enormous profits, supposedly derived from secret trading in debentures issued by European "prime" banks. The conspirators included Stephen Oles, a self-described"trader" in the fraudulent investment programs; appellant Ernst Tietjen, another trader; Ramona Holcombe and Stanie Benz, who served as "project managers" or "directors" for the programs; appellant Gary Bollin, a "broker" for the fraudulent investments; Roger Damron, who offered the investments in and near Huntington, West Virginia; David Raimer and his wife, Jennifer, who conducted numerous bank transactions involving investors' funds; and appellant James Gormley, an attorney from Atlanta, Georgia, who advised and assisted Oles, David Raimer, Bollin, and Damron with the fraudulent investments and money laundering. The cast of characters relevant to Appellants also included Finbar F. Dempsey & Company, a law firm in the Turks and Caicos Islands; Robert Edwards, an escrow agent and attorney in Atlanta; Dr. Ralph and Rita Touma, investors; and other investors in the programs.[1]

In mid-1995, David Raimer and Oles began offering investment programs under the name "Exodus International." The programs involved supposed trading of European "prime bank" debentures and promised very high rates of return with little or no risk to investors. According to the Exodus literature that they distributed, the programs were available on a limited basis to groups of investors whose money would be pooled and delivered to a "prime"

[1]Because only the appeals of Bollin, Tietjen, and Gormley are before us, we limit our discussion of the facts to those facts relevant to Appellants.

bank. The investment principal was supposedly secured by a bank guarantee and, therefore, was never at risk. Millions of dollars in profits were to be generated within a few months from the trading of debentures. For example, one program, "Program 39," offered a profit of $73,000,000 in ten months, based on an investment of $400,000.

To carry out the scheme, bank accounts were established with the guidance and assistance of Oles's attorney, appellant Gormley. Raimer established an escrow account in Orlando, Florida, under the name "Exodus International." Per Gormley's advice, the account was to be non-interest bearing so as to avoid attracting the IRS's attention. The account was to be used ostensibly to deliver investors' funds into a debenture trading program. Gormley also helped establish an offshore account in the Turks and Caicos Islands in the name of "BCI Corporation," which was part of a so-called "three-tiered" offshore trust. According to Gormley, the offshore trust would shield income from taxation and was the "vehicle" through which the debenture trading program was to be conducted.

Appellant Bollin learned about Exodus International Program 39 in May 1995. At Oles' suggestion, Bollin discussed the program with Gormley. Gormley explained to Bollin how the program worked and drew a sketch for him showing how funds would move through the program. Gormley told Bollin that debenture trading programs work "if they're handled right" and that "once they start paying, they pay forever." After Bollin gave Gormley literature about Program 39, Gormley told him that the program looked "pretty good."

Gormley also recommended the Exodus International Program to Stanie Benz. Gormley told Benz that he had extensive experience reviewing debenture trading programs and that he had reviewed the Exodus Program and found it

to be a good investment. Gormley explained the relationship between debenture trading programs and offshore trust accounts, and described how such an account could be used as a holding point for pooling investors' funds and for transferring funds without their being traceable.

Bollin introduced the Exodus Program 39 to Roger Damron. At Bollin's recommendation, on July 20, 1995, Damron met with Gormley. Gormley advised Damron concerning the Program 39 literature and debenture trading programs in general, and advised him on foreign grantor trusts to facilitate the investments and avoid tax liability. Gormley had Finbar F. Dempsey & Company set up foreign grantor trusts in the Turks and Caicos Islands for Damron and Bollin. Gormley also established international business corporations for Damron and Bollin and advised them about their use in conducting business for the trusts. In addition, Gormley prepared several documents for Bollin and Damron, such as profit sharing agreements. The idea was that Damron would bring investors into the programs, Bollin would act as the broker, and Ramona Holcombe would serve as the program manager and link to the trader, Stephen Oles, who would conduct the actual trading.

Damron approached a couple with whom he had a previous investment relationship, Dr. Ralph and Rita Touma, and sought money to place in Exodus Program 39.[2] The Toumas decided to invest, and, in late July 1995, gave Damron $750,000. Damron put $400,000 in an escrow account held by Robert Edwards, another Atlanta attorney, awaiting an opening in Program 39. Unbeknownst to the Toumas, Damron paid Bollin $75,000 from this money.

---

[2]According to Damron, Dr. and Mrs. Touma were his "best customers" in the Gold Eagle Program, a program run by Damron that involved investments in gold coins.

On September 13, 1995, Holcombe faxed to Gormley the wire coordinates to transfer funds into Program 39. Gormley forwarded the fax to Bollin, who then faxed it to Damron.[3] Then, on September 19, 1995, Gormley drafted a letter for Damron's signature, directing the transfer of the $400,000 from Edwards' escrow account to Bollin's foreign grantor trust in the Turks and Caicos Islands, an account set up by Gormley. Damron signed the letter and sent it to Edwards. Edwards wired the money as instructed on September 20, 1995.[4] A few days later, the money was again transferred, this time from Bollin's trust account to Damron's trust account, also set up by Gormley in the Turks and Caicos Islands. From Damron's account, the money was sent to the BCI Corporation account in the Turks and Caicos Islands, an account controlled by Oles and Raimer.

After the Toumas' money was sent off, Damron began collecting money from other people for investment in another, similar trading program, the "second deal." Bollin told Damron that the second deal would again involve Oles as the trader, but would involve Benz as the "project director." Oles later "lateraled" his role as the trader to appellant Tietjen. Although the second deal was similar to Exodus Program 39, instead of the money going to Oles' BCI Corporation account in the Turks and Caicos Islands, the money was transferred to an account in England.

Oles had introduced Tietjen to Benz. Tietjen was the head of a church known as the Apostolic Order of the Remnant House of Israel (AORHI). According to Tietjen, AORHI existed wherever he lived, supposedly for the purpose of funding humanitarian projects. To fulfill its purpose,

---

[3]This fax is the basis for the wire fraud charge in Count Three.

[4]The transfer of the $400,000 is the basis for the money laundering charge in Count Six.

AORHI created other entities, which Tietjen called limited trusts, to hold assets, and an entity called General Securities, Ltd. (GSL), to "assist in the money-making." Under cover of these entities, Tietjen created official-looking financial documents, such as a "Zero Coupon Prime Capital Note," and offered debenture trading programs with very high rates of return. In all, Tietjen received, or expected to receive, $2.4 million of investors' funds for placement in his debenture trading program.

After Damron sent the money for the second deal, he collected another $140,000 from investors in November and December 1995 for placement in yet another debenture trading program, the "third deal." In January 1996, Damron wired $130,000 of the investors' money to his account in the Turks and Caicos Islands. The money was to be sent off for investment.

As it turned out, the debenture trading programs were complete frauds. The Government's expert explained that investment programs involving the trading of debentures or other financial instruments issued by so-called "prime banks" do not exist. Indicators of the fraudulent nature of such programs include the use of the term "prime bank;" convoluted and nonsensical descriptions of the investment program itself; very unrealistic rates of return with little or no risk; an assertion that investors' funds represented "good, clean cleared funds of non-criminal origin;" and the claim that entities such as the Federal Reserve Bank or the World Bank had approved the programs or accepted the documents. These characteristics of fraud were present in the Exodus Program 39 documents.

Instead of placing the money into bank debentures, Oles transferred the money from the BCI Corporation account to the Exodus International account in Orlando. David Raimer withdrew funds from the account and sent cash to Oles

upon request. Oles used these funds for himself, and Raimer also kept large sums. The funds sent to Tietjen similarly were not placed in a debentures trading program, but instead worked their way through various accounts in the names of AORHI and others, with much of the money being used by Tietjen for his own purposes.

When the Toumas, Damron's investors in Program 39, did not receive payments as promised, they began to call Damron regularly to find out when their payouts would materialize. Oles reportedly assured Bollin that payments were imminent. In turn, Bollin reassured Damron, who, in turn, reassured the Toumas. After more time passed without a payout, the Toumas eventually spoke with Bollin and Gormley. Bollin assured them that the payout would come and that he, like them, was waiting for money. He also told them that he had previously traded in these programs and that while it was normal for payment to be delayed, the programs always paid. Bollin said that he would get paid only if the investment paid out, failing to disclose that Damron had already paid him $75,000 out of the Toumas' money. Gormley told the Toumas that he did not know much about their investment, but that he knew these programs did pay out in the past, and that the delays "usually work themselves out in a week or so." Gormley told the Toumas that they had the option to sue Oles for their money, but warned that a law suit would only lead to more delays in receiving their money.

Bollin also spoke with another investor, Marianne Bradley, who had invested as part of the second deal. When Bradley asked about the status of her investment, Bollin stated that "trades are being made," that trading had started on January 16, and that "we" had "frozen the account to protect the money." Bollin also stated that he had invested $100,000 in the same program as Bradley and that he would occasionally get involved in a trading program with

$100,000 to $500,000. He stated that based on his experience, the program would either pay out as promised in ten days or Bradley would get her money back. Bollin, however, did not invest any of his own money in the second deal, and his only investment experience had been a $100 investment several years before.

Finally, in January 1996, the Toumas reported their dealings with Damron to the FBI. On February 9, 1996, the FBI conducted a search of Damron's house. Shortly thereafter, a grand jury investigation was commenced in Huntington, West Virginia.

Damron decided to return to the investors the $130,000 sent to his account in the Turks and Caicos Islands for the third deal. Damron wired over $120,000 of the money to Gormley and $8,000 to himself so that Gormley could arrange for checks to the investors. Gormley also arranged for backdated paperwork to be created by the attorneys in the Turks and Caicos Islands to explain the earlier transfer of $130,000 as a "loan" from one of Damron's companies to another. The loan paperwork was created in March 1996, but was backdated to January 17, 1996, the date of the $130,000 transfer.

Damron was eventually indicted for his involvement in the investment fraud scheme. After the indictment, Oles decided to send Damron $50,000. Damron was then under a financial reporting requirement with the court. He contacted Gormley, who advised him how to structure the transaction so as to avoid the court-imposed reporting requirement. On Gormley's advice, the transfer was structured as a loan from Bollin's wife to Damron's wife. Bollin kept $10,000 for himself and sent the remaining $40,000 to Damron in increments of $5,000. Gormley also assisted in Damron's receipt of an additional $100,000 from Oles, again funneled through the Turks and Caicos Islands.

In August 1997, Gormley informed Damron that Oles was again sending money to Damron, $400,000, to be used to pay back certain investors. Gormley and Damron discussed how to use the money for "damage control." They decided to repay Damron's numerous investors in the second deal but not the Toumas. Damron prepared a list of investors who had invested in the program and how much they had invested. He gave the list to Gormley. Later, Damron sent a separate letter to Paul Dempsey in the Turks and Caicos Islands, detailing the investors who were to receive payments and directing that the payments be made. A copy of that letter with Damron's handwritten notation that it had been faxed to Dempsey was found in Gormley's office. The investors listed in Damron's letter were all paid, receiving checks from the Turks and Caicos Islands in plain envelopes with no return address and no cover letter. Approximately $400,000 was repaid to twenty investors. Gormley was paid $20,000 by Oles for his services.

When the Government learned of the payments to the investors, who were potential witnesses against Damron, it sought to have the money placed in escrow pending resolution of Damron's case. At a hearing in October 1997, Gormley testified that to his knowledge, Damron had not directed, coordinated, or orchestrated the payments to investors.

Damron eventually pleaded guilty to mail fraud and money laundering and agreed to cooperate with the United States in its investigation of the other conspirators. On September 9, 1998, Appellants Gary Bollin, Ernst Tietjen, and James Gormley were charged in a fourteen-count indictment, along with co-defendants Stephen Oles, Ramona Holcombe, Stanie Benz, David Raimer, and Jennifer Raimer, for criminal acts stemming from the fraudulent investment scheme.

Count One charged all defendants with conspiring to commit wire fraud, securities fraud, and obstruction of justice, in violation of 18 U.S.C. S 371. Count Two charged all defendants with violating 18 U.S.C. S 1956(h), conspiracy to launder money. The indictment also included a forfeiture provision as to all defendants, premised upon a conviction for money laundering, and included a notice to seek substitute assets. Tietjen was not named in any of the other counts.

Both Gormley and Bollin faced additional charges. Both were charged in Count Three with aiding and abetting wire fraud, in violation of 18 U.S.C. SS 1343 and 2. Count Six charged them with aiding and abetting money laundering, in violation of 18 U.S.C. SS 1956(a)(1)(A)(i) and 2. Bollin was also charged in Count Four with an additional count of wire fraud, and in Counts Seven and Eight with two more counts of money laundering. In Counts Nine and Ten, Bollin was charged with selling securities without having registered with the Securities and Exchange Commission, in violation of 15 U.S.C. SS 78o(a)(1) and 78ff. Gormley was charged in Counts Thirteen and Fourteen with perjury, in violation of 18 U.S.C. S 1623. The district court dismissed Count Fourteen at trial.

Before trial, defendants David Raimer and Stanie Benz pleaded guilty to charges in the indictment. The charges against Jennifer Raimer were dismissed. Stephen Oles fled and remained a fugitive throughout the trial. On November 19, 1999, a jury returned a guilty verdict against the remaining defendants on each count submitted to the jury. The jury also returned a $1.2 million forfeiture verdict. The district court denied the post-trial motions for judgment of acquittal and/or a new trial made by Gormley, Bollin, and Tietjen.

The district court sentenced Bollin to 108 months imprisonment, three years supervised release, and restitution in the amount of $783,535.[5] The court sentenced Tietjen to 135 months imprisonment, two years supervised release, and $1,761,035 in restitution.[6] The court sentenced Gormley to 97 months imprisonment, three years supervised release, and $783,545 in restitution.[7] Each defendant was also found jointly and severally liable for the $1.2 million forfeiture.[8] Following the entry of judgment against each defendant, each defendant filed a timely notice of appeal.

II. SUFFICIENCY OF THE EVIDENCE

Appellant Gormley challenges the sufficiency of the evidence supporting his convictions on Counts One, Two, Three, Six, and Thirteen. In reviewing the sufficiency of the evidence, a reviewing court must take the evidence in the light most favorable to the government and must determine whether any rational juror could have found the elements of the offense beyond a reasonable doubt. United States v.Burgos, 94 F.3d 849, 862 (4th Cir. 1996).

---

[5]Bollin was sentenced to 108 months imprisonment on Counts Two, Six, Seven, Eight, Nine and Ten, and 60 months on Counts One, Three and Four, to run concurrently.

[6]Tietjen was sentenced to 60 months imprisonment on Count One and 135 months on Count Two, to run concurrently.

[7]Gormley was sentenced to 60 months imprisonment on Counts One, Three, and Thirteen, and 97 months on Counts Two and Six, to run concurrently.

[8]In an interlocutory appeal, Gormley challenged the district court's ruling that he could be held jointly and severally liable for any forfeitable assets possessed by his codefendants. This court affirmed in an unpublished opinion. United States v. Gormley, 176 F.3d 476, 1999 WL 212008 (4th Cir. 1999) (per curiam) (unpublished).

A. Sufficiency of the Evidence on Count One--Conspiracy to Commit Wire Fraud, Securities Fraud, and Obstruction of Justice

To support a conviction for conspiracy, "the government must show, first, that a conspiracy existed; then that the defendant had knowledge of the conspiracy; and finally, that the defendant voluntarily became a part of the conspiracy." United States v. Bell, 954 F.2d 232, 236 (4th Cir. 1992), overruled on other grounds by Burgos, 94 F.3d at 862. Gormley contends that the Government proved three distinct conspiracies instead of the single conspiracy alleged in Count One of the indictment: one conspiracy to commit wire fraud, a second conspiracy to commit securities fraud, and a third conspiracy to obstruct justice. Gormley argues that the Government's proof resulted in a material variance.

A "variance" occurs when "the evidence at trial establishes facts materially different from those alleged in the indictment." United States v. Kennedy, 32 F.3d 876, 883 (4th Cir. 1994). A defendant may establish that a material variance occurred "by showing that the indictment alleged a single conspiracy but that the government's proof at trial established the existence of multiple, separate conspiracies." Id.; see also Kotteakos v. United States, 328 U.S. 750, 755-56 (1946). The question whether the evidence shows a single or multiple conspiracies is for the jury, and the finding of a single conspiracy must stand unless the evidence, taken in the light most favorable to the Government, would not allow any reasonable juror to reach such a verdict. United States v. Urbanik, 801 F.2d 692, 695 (4th Cir. 1986).

We are satisfied that the jury's finding of a single conspiracy was supported by substantial evidence. Although the conspiracy had multiple objects--wire fraud, securities fraud, and obstruction—the objects clearly were related to

the overall goal of defrauding investors through fraudulent offshore debentures trading programs. See United States v. Squillacote, 221 F.3d 542, 574 (4th Cir. 2000) (explaining that a close relation between the objects of alleged separate conspiracies supports a finding of a single conspiracy), cert. denied, 121 S.Ct. 1601 (2001); United States v. Walsh, 544 F.2d 156, 161 (4th Cir. 1976) (noting that a single conspiracy may have multiple objects). The co-conspirators obtained funds from investors through securities fraud. The wire fraud was used to move the investors' funds into the hands of Oles, the Raimers, and Tietjen. The obstruction was part of controlling the damage after Damron came under investigation for his role in the fraudulent debentures trading program.

The fact that some of the co-conspirators, including Gormley, never marketed the debentures trading programs to the actual investors does not prevent a finding of a single conspiracy because a defendant may be a member of a conspiracy without taking part in all of its activities. See United States v. Banks, 10 F.3d 1044, 1054 (4th Cir. 1993). Similarly, a single conspiracy may be found even though Tietjen, Holcombe, and Benz were not active in returning money to investors. The very structure of the scheme in this case required the conspirators to play different roles--brokers, project managers, and traders--to carry out the fraud and obscure the disposition of funds placed in the trading programs. Gormley prepared the different instruments used to carry out the scheme to defraud investors and directed the opening of the offshore trusts. Further, because a shifting membership in the conspiracy does not preclude a finding of a single conspiracy, a single conspiracy may be found even though Benz and Tietjen were involved only in later deals. United States v. Lozano, 839 F.2d 1020, 1023 (4th Cir. 1988). Finally, regardless of whether "hostility" arose between Oles on one side and Damron, Gormley and Bollin on the other after Damron was

indicted in 1997, Oles was the source of the funds sent to Damron and the source of the funds used to repay investors, thus supporting the conclusion that they were participating in a common scheme. In sum, the evidence was sufficient to support the jury's finding of a single conspiracy.[9]

Moreover, even if the evidence established separate conspiracies, a variance is grounds for reversal only if it infringed the defendant's "`substantial rights' and thereby resulted in actual prejudice." Kennedy, 32 F.3d at 883. "In order to show actual prejudice stemming from a multiple conspiracy variance, an appellant must prove that `there are so many defendants and so many separate conspiracies before the jury' that the jury was likely to transfer evidence from one conspiracy to a defendant involved in an unrelated conspiracy." Id. (quoting United States v. Caporale, 806 F.2d 1487, 1500 (11th Cir. 1989)).

In Kennedy, we held that an alleged variance had no prejudicial effect because there was "no possibility that evidence from unrelated conspiracies would be improperly attributed to individual defendants." Kennedy, 32 F.3d at 883. Kennedy involved eight defendants and, at most, three related conspiracies. We recognized that "cases involving similar numbers of defendants and conspiracies are `not so complex by definition that the jury will be unable to segregate the evidence properly.'" Id. (quoting Caporale, 806 F.2d at 1501 (eleven defendants and two conspiracies)). Further, the fact that the district court ordered a severance, and each defendant thus faced trial alone, virtually

---

[9]The evidence also was sufficient to support the jury's conclusion that Gormley was part of the conspiracy. Gormley was involved with Oles, the Raimers, Bollin, and Damron from the very beginning. Gormley knew how the Exodus Program worked, as we discuss in more detail below, knew the program was fraudulent, and took actions in furtherance of the scheme. After Damron was placed under investigation, Gormley also played a role in the return of funds to investors.

eliminated any likelihood of prejudicial "spillover" of evidence. Id.

Like in Kennedy, this case involves only eight named defendants and, if there was a variance, at most three conspiracies. Although the district court did not order a severance, only four of the eight defendants named in the indictment were tried together. Further, the district court granted Gormley's request for a multiple objects jury instruction, instructing the jury to consider each defendant's role in the conspiracy. The verdict form required the jury to make particularized findings about which objects each defendant conspired to violate, further helping the jury to compartmentalize the evidence as to each defendant. Any risk of a "spillover effect" was slight. Gormley's conviction on Count One is affirmed.

B. Sufficiency of the Evidence on Count Three, Wire Fraud

To convict Gormley for wire fraud in violation of 18 U.S.C. S 1343, "the government must prove: `1) a scheme to defraud and 2) the use of a wire communication in furtherance of that scheme.'" United States v. ReBrook, 58 F.3d 961, 966 (4th Cir. 1995) (quoting United States v. Brandon, 50 F.3d 464, 467 (7th Cir. 1995)); see also 18 U.S.C. S 1343. Gormley argues that the evidence is insufficient to prove that he transmitted or caused to be transmitted to Damron a September 13, 1995, memorandum, which furnished the wire coordinates for investors to send funds to Oles' offshore Exodus account. Gormley also argues that the Government failed to prove that Gormley knew the funds to be sent to Oles' offshore account came from the Toumas, and thus the Government failed to prove that Gormley had the requisite fraudulent intent. We conclude that the evidence was sufficient to support the jury's verdict.

Holcombe testified that she faxed the memorandum containing the wire coordinates to Gormley's office on September 13, 1995, and the fax headers on the document confirm her testimony. Damron testified that he received the memorandum from Bollin on September 13, 1995. Bollin testified that he could not recall how he obtained the document. Holcombe, however, testified that she faxed the memorandum only to Gormley because she believed that he was the person controlling the funds. Although Gormley shared office space with seven to nine other attorneys, he was a sole practitioner, and the attorneys in Gormley's space-sharing arrangement did not share clients. There is no evidence that Bollin worked with any of the other attorneys in Gormley's office. The evidence supports the conclusion that Gormley received the memorandum from Holcombe and furnished it to Bollin, who in turn sent the memorandum to Damron.

Further, assuming that Gormley did not know the $400,000 came from the Toumas,[10] Gormley's lack of knowledge is irrelevant because, as the Government points out, it was not required to prove that anyone had put up any money and had actually been defrauded in the wire fraud scheme (i.e., that the scheme succeeded), so long as the act of wire fraud was in furtherance of the scheme. See United States v. Bryan, 58 F.3d 933, 943 (4th Cir. 1995), abrogated on other grounds by United States v. O'Hagan, 521 U.S. 642, 650 (1997). Gormley's delivery of the wire coordinates for Oles' offshore account was in furtherance of the fraudulent investment scheme. Moreover, there is sufficient evidence from which the jury could infer that, by the time of the September 13, 1995, fax, Gormley knew the scheme was fraudulent. Gormley was a self-proclaimed securities

---

[10] As we discuss below, there was sufficient evidence from which the jury could infer that Gormley was aware that the Toumas had contributed to the $400,000.

lawyer, and he claimed to be an expert on investment programs. Gormley reviewed the Exodus Program documents and was aware that the Program was a prime bank debentures trading program. The Government's expert testified that there were numerous indicators of fraud in the Exodus Program documents that should have raised a red flag to an experienced securities lawyer. If Gormley was not already aware that the debentures trading program was a scam, on August 17, 1995, Gormley met with Agent David Caruso of the Federal Bureauof Investigations, who explained the fraudulent nature of investment programs involving "prime bank" financial instruments, like the Exodus Program. We conclude that Gormley's wire fraud conviction was supported by the evidence.

C. Sufficiency of the Evidence on Count Six, Money Laundering, and Count Two, Money Laundering Conspiracy

A money laundering conviction under 18 U.S.C. S 1956 requires:

> (1) that the defendant conduct a financial transaction with at least a de minimis effect on interstate commerce; (2) that the transaction involved the proceeds of a specified unlawfulactivity; (3) that the defendant knew that those proceeds were derived from that specific unlawful activity; and (4) that the defendant engaged in the transaction intending to promote that unlawful activity.

United States v. France, 164 F.3d 203, 208 (4th Cir. 1998), cert. denied, 527 U.S. 1010 (1999); 18 U.S.C. S 1956(a)(1)(A)(i). Funds are the proceeds of unlawful activity if they "are derived from an already completed offense, or a

completed phase of an ongoing offense." United States v. Conley (Conley I), 37 F.3d 970, 980 (3d Cir. 1994); see also United States v. Butler, 211 F.3d 826, 829 (4th Cir. 2000), cert. denied, 121 S. Ct. 1091 (2001). "This is true even if the money laundering transaction can also be considered a part of the continuing specified unlawful activity." United States v. Morelli, 169 F.3d 798, 804 (3d Cir.), cert. denied, 528 U.S. 820 (1999). A defendant must have subjective knowledge that the funds were the proceeds of unlawful activity. United States v. Campbell, 977 F.2d 854, 857 (4th Cir. 1992).

Gormley's money laundering conviction is based on the September 20, 1995, transfer of $400,000 from Edwards' escrow account to Bollin's trust account in the Turks and Caicos Islands. Gormley drafted a letter dated September 19, 1995, from Damron to Edwards directing Edwards to release the $400,000.[11] Gormley disputes only whether the Government proved that he knew the funds were the proceeds of fraud. Gormley argues that the evidence failed to establish that Gormley knew the Toumas had put up the $400,000, but instead established that Gormley had been informed by Damron that the money came from Damron's profits from trading in Gold Eagle coins. There was substantial evidence, however, from which the jury could reasonably infer that Gormley knew the $400,000 was the proceeds of fraud.

In July 1995, Damron discussed with Gormley the Exodus Program documents, foreign bank debenture trading programs, and foreign grantor trusts. Damron testified that he wanted a foreign grantor trust because the money he

---

[11]Gormley suggests that the evidence showed that Damron drafted the release letter, not Gormley. We disagree. Damron testified on direct examination that Gormley drafted the release letter, which Damron then signed and sent to Edwards. Damron did not repudiate his testimony that Gormley drafted the letter, but merely confirmed on cross examination that he instructed Edwards in a letter that the $400,000 was to be transferred.

planned to place in the Exodus Program would be his clients' money: "If I participated in the program, it would be with money from my clients. So I felt that I should have control over it, I should have my own foreign grantor trust." Damron's client with regard to the $400,000 was Dr. Touma. To protect Dr. Touma's interest, Damron asked Gormley about designating beneficiaries of his foreign grantor trust:

Q: When did you have your discussion with Mr. Gormley about foreign grantor -- beneficiaries of foreign grantor trusts?

A: That was -- would be just probably late July. It wasbefore Dr. Touma -- or maybe shortly thereafter--when Dr. Touma was getting ready to make that largeinvestment, he was concerned that if I was okay, it wasokay, but what if something happened to me. Hewanted some protection for his money. And so I askedMr. Gormley what could we do.

Q: What did Mr. Gormley tell you?

A: Well, that's what we did. We set up that successor beneficiary thing so that if something happened to me, itwas all spelled out who would get what percentage ofthe money.

This testimony supports an inference that Gormley knew Dr. Touma had contributed to the $400,000.

Further, Gormley confirmed in a letter dated July 24, 1995, that Dr. Touma was set up as the beneficiary of the trust. In the same letter, Gormley mentioned that "as to the investment matter we discussed," the funds would be held in Gormley's escrow account pending receipt of documents and a bank guarantee. Damron testified that the "investment matter" was the placement of $400,000 into the Exodus Program. Gormley was aware that Damron had deposited the $400,000 with an escrow agent, Edwards, in preparation for the investment. At this point, Gormley refused to give Damron the "green light" because no bank guarantee had yet been provided.

A short time later, in August 1995, Gormley met with Agent Caruso of the FBI, who explained to Gormley the fraudulent nature of prime bank debenture trading programs. By this point, if not earlier, Gormley knew these debenture trading programs were fraudulent. Nonetheless, on September 13, 1995, in furtherance of a program he knew was a scam, Gormley sent to Bollin the fax from Oles and Holcombe containing the wire coordinates to Oles' offshore Exodus account, thereby participating in wire fraud.

Gormley then prepared and faxed a profit sharing agreement between Damron and Bollin, dated September 18, 1995. The agreement noted that "Damron has introduced Bollin [sic] certain individuals who have placed U.S. $400,000 in Escrow for investment." This agreement contemplated Damron and Bollin splitting profits of over $1.8 million per week. Gormley then prepared for Damron the September 19, 1995, letter instructing Edwards to transfer the $400,000 to Bollin's foreign grantor trust. The funds were transferred the next day.

There is sufficient evidence to establish that Gormley knew the Exodus Program was a fraud, knew the $400,000 was being investedin this fraud, and knew he was facilitating the transfer of the funds to the perpetrators of this fraud. Furthermore, based on his knowledge that Dr. Touma was the beneficiary of Damron's foreign grantor trust, the reference to "certain investors" in the Bollin/Damron profit sharing agreement, and Gormley's connections with and knowledge of the relationships among Oles, Bollin, Damron, their offshore accounts, and the Exodus Program, the jury could reasonably infer that, at the time Gormley participated in the transfer of the $400,000 to Bollin's offshore account, Gormley knew the money was the proceeds of fraud.[12] We are satisfied that there was sufficient evidence to support Gormley's money laundering conviction.

Gormley raises the same arguments as to the sufficiency of the evidence on Count Two, the money laundering conspiracy charge. For the same reasons, we conclude that there was sufficient evidence to support the jury's verdict.

D. Sufficiency of the Evidence on Count Thirteen, False Declarations before the Court

Gormley was convicted of making false declarations before the court under 18 U.S.C. S 1623(a), based on two allegedly false statements that he made at an October 23, 1997, contempt hearing. In 1997, after Damron was placed under investigation, a financial restraining order was issued against Damron. While that restraining order was in effect, approximately $400,000 was repaid to certain investors.

---

[12]Thus, it is irrelevant whether Gormley, as an attorney, had a duty to inquire as to the source of his client's funds because he knew the $400,000 was the proceeds of fraud. Indeed, Gormley knew the $400,000 was the proceeds of a fraudulent scheme when he participated in wire fraud in furtherance of that scheme on September 13, 1995.

When questioned about the $400,000 in repayments, Gormley testified as follows:

> Q: And what is your understanding as to those disbursements and how they occurred?
>
> A: And I believe that those are the bank drafts that theseindividuals received. And from everything I know, thatmoney was not Mr. Damron's money, he didn't own it, he didn't control it.
>
> And I don't know what this word "expectancy interest" is in the Court's order, exactly what that means, but I don't believe that Mr. Damron had any such interest inthat money.
>
> Q: Did Roger A. Damron direct or coordinate or orchestrate the disbursement of these funds to these individualinvestors?
>
> A: To my knowledge he did not.

The indictment alleged that at the time of his testimony, Gormley knew Damron had an interest in the $400,000 and knew Damron had coordinated, orchestrated and directed the repayments. Gormley contends that his perjury conviction should be reversed because (1) there was insufficient evidence to show that Gormley knew of Damron's role in the repayment; (2) the examiner's questions before the grand jury were fundamentally ambiguous and were insufficient as a matter of law to

support a perjury conviction; and (3) his responses were literally true.

The evidence was sufficient to show that, at the time of his testimony, Gormley knew of Damron's role in returning the money to the investors. Before any money was sent to the investors, Damron and Gormley discussed who should be paid. Damron prepared a list of the amounts due to the investors and sent the list to Gormley. The persons on that list were the persons who were eventually paid. Further, discovered in Gormley's office was a copy of a handwritten fax from Damron to Paul Dempsey in the Turks and Caicos Islands, directing the repayment of money to the investors. The fax was dated August 27, 1997, and a notation indicated that it was faxed "before 10:30 am." Damron testified that it was his practice to make a notation in the upper right corner of a document when he faxed it. Moreover, based on the presence of the notation on faxes that Gormley received from Damron, the jury could reasonably infer that Gormley was fully aware of Damron's practice. Although Damron testified that Gormley refused to forward to Dempsey the list of investors to be repaid and advised Damron not to do it himself, there is sufficient evidence to support the conclusion that, at the time of his October 23, 1997, testimony, Gormley knew Damron had directed Dempsey to send the money to the investors.

Gormley argues that the examiner's question whether Damron "directed, coordinated, or orchestrated" the disbursement of funds to the investors was fundamentally unclear and impossible to answer, and therefore an improper basis for a perjury charge. Gormley argues that the question asked of him is like the question found insufficient to support a perjury conviction in United States v. Rendon-Marquez, 79 F. Supp. 2d 1361 (N.D. Ga. 1999), aff'd mem., 228 F.3d 416 (11th Cir. 2000). In Rendon-Marquez, the defendant was asked on an INS form, "Have

you knowingly committed any crime or offense, for which you have not been arrested; or have you been arrested, cited, charged, indicted, convicted, fined, or imprisoned for breaking or violating any law or ordinance, including traffic violations?" The form provided for only a "yes" or a "no" response. The defendant answered in the negative, but had once been arrested. The district court granted a judgment of acquittal because it found the question to be a confusing compound question that asked two separate and distinct questions, but provided for only a yes/no response. Id. at 1363. The result was that the defendant would give a partially false answer no matter how he responded, making the defendant's response to the question an improper basis for a perjury conviction. Id.

"[P]recise questioning is imperative as a predicate for the offense of perjury." Bronston v. United States, 409 U.S. 352, 362 (1973). Unlike in Rendon-Marquez, Gormley was asked a single question, to which he gave a fully false response. The question asked of Gormley presented three possibilities, all of which--direct, coordinate, and orchestrate--are similar in meaning. All three refer to some conduct on Damron's part intended to bring about the repayment of investors. The evidence showed that Damron engaged in such conduct and that Gormley knew Damron engaged in such conduct. We find the question to be perfectly intelligible.[13] The question asked of Gormley was not ambiguous or unanswerable, and the matter was properly submitted to the jury. See United States v. Heater, 63 F.3d 311 (4th Cir. 1995) (affirming a perjury conviction based on the defendant's false response to the question whether he had ever "bought or sold marijuana" because the question did not contain any

[13]Moreover, the question appears to have been perfectly intelligible to Gormley. As his response to the first question indicates, when Gormley did not understand a question or a term, he communicated his lack of understanding.

fundamental ambiguity that would have prevented the jury from considering the question).

Gormley next argues that his response to the second question was literally true because it was Oles, not Damron, who provided the funds to be used for repayment. "A literally true answer, even though unresponsive or `shrewdly calculated to evade,' cannot form the predicate for a perjury conviction." United States v. Sainz, 772 F.2d 559, 563 (9th Cir. 1985) (quoting United States v. Cowley, 720 F.2d 1037, 1042 (9th Cir. 1983)). However, "`an answer that is responsive and false on its face does not come within [a] literal truth analysis simply because the defendant can postulate unstated premises of the question that would make his answer literally true.'" United States v. Fulbright, 804 F.2d 847, 851 (5th Cir. 1986) (quoting United States v. Cuesta, 597 F.2d 903, 920 (5th Cir. 1979)). Even though Oles provided the $400,000, there was sufficient evidence to establish that Damron was the one who instructed Dempsey to repay certain investors and how much to pay them. Gormley knew of Damron's role in the repayment but testified to the contrary.[14] Gormley's perjury conviction is affirmed.

---

[14]We need not reach Gormley's argument that his response to the first question was literally true because his false response to the second question was sufficient to support his conviction. The jury was entitled to find Gormley guilty for either response because the United States charged in the conjunctive, charging that Gormley falsely testified about whether Damron had an interest in the $400,000 and whether he had, in fact, coordinated, orchestrated, and directed the repayment of investors. See Turner v. United States, 396 U.S. 398, 420 (1970) (reaffirming the "general rule" that where an indictment charges several acts in the conjunctive, a guilty verdict stands if the evidence is sufficient with respect to any one of them); United States v. Sarihifard, 155 F.3d 301, 310 (4th Cir. 1998) (applying the Turner rule to a perjury charge).

III. TRIAL ERRORS

Bollin and Tietjen challenge several of the district court's evidentiary rulings. Decisions regarding the admissibility of evidence are committed to the sound discretion of the trial court and will not be reversed absent an abuse of discretion. United States v. Bostian, 59 F.3d 474, 480 (4th Cir. 1995). Where a defendant fails to object to an asserted error at trial, the "plain error" standard applies. United States v. Olano, 507 U.S. 725, 731-32 (1993); Fed. R. Crim. P. 52(b).

A. Attorney-Client Privilege

Bollin contends that Robert Edwards' testimony was admitted in violation of Bollin's attorney-client privilege. The district court's decision whether certain evidence is subject to the privilege is a mixed question of law and fact subject to de novo review. In re Grand Jury Proceedings, 33 F.3d 342, 353 (4th Cir. 1994). The party claiming the privilege bears the burden of demonstrating that: "the attorney-client privilege applies; (2) the communications were protected by the privilege; and (3) the privilege was not waived." United States v. Aramony, 88 F.3d 1369, 1389 (4th Cir. 1996). Assuming that an attorney-client relationship existed between Bollin and Edwards,[15] Bollin does not identify any particular testimony that allegedly was privileged, but instead argues that Edwards should not have been allowed to testify at all. It is well-established, however, that the attorney-client privilege protects only confidential communications made for the purpose of seeking legal advice. E.g., United States v. Tedder, 801 F.2d 1437, 1441-42 (4th Cir. 1986). The privilege does not prevent an attorney from testifying as to non-confidential matters.

---

[15]The record shows that Bollin contacted Edwards to act as an escrow agent and not for the purpose of seeking legal advice. The district court assumed, without finding, that an attorney-client relationship existed between Bollin and Edwards.

Moreover, we agree with the district court that Bollin waived any privilege that may have attached when he testified to the grand jury regarding the same transactions and communications about which Edwards testified. See United States v. Plache, 913 F.2d 1375, 1380 (9th Cir. 1990) (finding a waiver of the attorney-client privilege where the defendant testified before the grand jury regarding his conversations with counsel). The fact that Bollin was testifying before the grand jury pursuant to a subpoena does not preclude effective waiver. See id. The district court did not err in allowing Edwards to testify.

B. Exclusion of Evidence of Oles' Flight

Bollin further contends that the district court abused its discretion by excluding evidence that co-defendant Stephen Oles absconded. Bollin argues that the evidence of Oles' flight would have shown Oles to be a man who manipulated Bollin into participating in the events in this case, and would have been highly probative of Bollin's intent. Although a co-defendant's flight may be relevant to show the guilt of that defendant, see United States v. Porter, 821 F.2d 968 (4th Cir. 1987), it does not tend to show that another defendant is innocent, at least not where, as here, there can be more than one guilty party. See United States v. Ortland, 109 F.3d 539, 545 (9th Cir. 1997). Further, any probative value of Oles' flight was substantially outweighed by the danger of confusing the issues where Oles was not being tried with the rest of the defendants. See Fed. R. Evid. 403. The district court did not abuse its discretion.

C. Admission of Bollin's Grand Jury Testimony

Bollin contends that the district court abused its discretion when it allowed the Government to present a redacted version of his grand jury testimony but refused to allow him to present the omitted portions under the rule of

completeness or the former testimony exception to the hearsay rule. We find no abuse of discretion.

1. Former Testimony Exception

Federal Rule of Evidence 804(b)(1) provides an exception to the hearsay rule for the former testimony of a declarant where the declarant is unavailable as a witness.[16] A declarant is "unavailable" when the declarant "is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement." Fed. R. Evid. 804(a)(1). Bollin contends that he was "unavailable" because he had invoked his Fifth Amendment privilege against self-incrimination.

A criminal defendant who invokes his Fifth Amendment privilege makes himself unavailable to any other party. United States v. Bumpass, 60 F 3d 1099, 1102 (4th Cir. 1995). Rule 804(a) provides, however, that "[a] declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying." Fed. R. Evid. 804(a). By invoking his Fifth Amendment privilege, Bollin made himself unavailable for the purpose of preventing his testimony, and he therefore cannot invoke the exception in Rule 804(b)(1). Accord United States v. Peterson, 100 F.3d 7, 13 (2d Cir. 1996) (holding that a defendant who exercises his privilege not to testify at a second trial of his case is not entitled to introduce the testimony he gave at the first trial); United States v. Kimball, 15 F.3d 54, 55-56 (5th Cir. 1994) (same).

---

[16]Bollin also argues that his grand jury statements are not hearsay. His statements to the grand jury were made out of court, and Bollin would introduce them to prove the truth of the matter asserted. They are hearsay. See Fed. R. Evid. 801(c). The statements were admissible by the Government as admissions under Rule 801(d)(2).

2. Rule of Completeness

The "rule of completeness" is found in Federal Rule of Evidence 106, which provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Fed. R. Evid. 106. The purpose of the rule is "to prevent a party from misleading the jury by allowing into the record relevant portions of the excluded testimony which clarify or explain the part already received." United States v. Wilkerson, 84 F.3d 692, 696 (4th Cir. 1996). The portions of the excluded testimony thus must be relevant to an issue in the case, and the court need only admit the portions that are necessary to clarify or explain the portion of the testimony already admitted. Id.

Bollin identifies several portions of his grand jury testimony that he contends should have been admitted under Rule 106. We have reviewed Bollin's grand jury testimony as admitted and his unredacted grand jury testimony. Like the district court, we conclude that the omitted testimony was not necessary to avoid misleading the jury or otherwise place the admitted testimony in context. The fact that some of the omitted testimony arguably was exculpatory does not, without more, make it admissible under the rule of completeness.

D. Admission of Tietjen's Grand Jury Testimony

The Government introduced against Tietjen a redacted version of his grand jury testimony. Because Tietjen did not raise at trial his objections to the admission of his grand jury testimony, the plain error standard of review applies. See Olano, 507 U.S. at 731-32.

Tietjen first argues that his grand jury testimony was taken in violation of his Fifth Amendment right against self-incrimination, and therefore should not have been admitted. His claim is foreclosed by United States v. Washington, 431 U.S. 181, 188 (1977). Like in Washington, after being sworn, Tietjen was explicitly advised that he had the right not to incriminate himself and that if any questions tended to incriminate him, he had the right under the Fifth Amendment not to answer the question. He was advised that anything he said could be used against him by the grand jury or in subsequent legal proceedings, and was advised of his right to counsel. The Government correctly and completely answered Tietjen's later questions regarding his Fifth Amendment privilege. These warnings eliminated any possible compulsion to self-incrimination. See id. at 188. Whether Tietjen was a target of the grand jury investigation is irrelevant under Washington. See id. at 189; United States v. Goodwin, 57 F.3d 815, 818-19 (9th Cir. 1995).

Tietjen also maintains that his Sixth Amendment right to counsel had attached at the time of his grand jury testimony. But at the time Tietjen testified to the grand jury, no adversary judicial proceedings against him had yet been initiated. See United States v. Gouveia, 467 U.S. 180, 187 (1984) ("[The Sixth Amendment] right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant."). The Government's warnings to Teitjen regarding his Fifth Amendment rights do not show that a prosecution had commenced. Indeed, no

indictment was returned against Tietjen until over one year after he testified to the grand jury. His Sixth Amendment right to counsel thus had not yet attached.

Tietjen further contends that his redacted grand jury testimony, read at trial, was not sufficiently complete under the "rule of completeness." Tietjen's grand jury testimony was redacted to remove all references to co-defendant Stanie Benz in order to comply with the rule in Bruton v. United States, 391 U.S. 123 (1968). Benz entered a plea on the day before trial and then testified against Tietjen. The redacted version of Tietjen's testimony nonetheless was introduced. However, the omitted portions of Tietjen's testimony were not necessary to avoid misleading the jury or to clarify or explain any portion of the admitted testimony, and the rule of completeness does not require the court to admit Tietjen's complete grand jury testimony solely because some portions might be exculpatory. See Wilkerson, 84 F.3d at 696. Moreover, Tietjen suffered no prejudice. Stanie Benz testified at trial, and Tietjen had full opportunity to cross examine her. The district court did not err.

IV. SENTENCING

The district court's factual findings underlying sentencing enhancements are reviewed for clear error. The district court's legal interpretations are reviewed de novo. United States v. Akinkoye, 185 F.3d 192, 201 (4th Cir. 1999), cert. denied, 528 U.S. 1177 (2000).

A. Two-Level Enhancement for Abuse of a Position of Trust

Both Bollin and Tietjen appeal the district court's application of a two-level enhancement under U.S.S.G. S 3B1.3 for abuse of a position of trust. Under S 3B1.3, a defendant's sentence is increased by two levels "if [the district court] determines

that the defendant abused a position of trust and that abuse significantly contributed to the commission or concealment of the crime." Id. at 203; U.S.S.G. S 3B1.3. "Whether a defendant occupied a position of trust warranting a two-level enhancement under U.S.S.G. S 3B1.3 is a factual determination reviewable for clear error." United States v. Glymph, 96 F.3d 722, 727 (4th Cir. 1996).

Whether a defendant held a position of trust must be "approached from the perspective of the victim." United States v. Gordon, 61 F.3d 263, 269 (4th Cir. 1995). Thus, the S 3B1.3 adjustment may be applied "in a case in which the defendant provides sufficient indicia to the victim that the defendant legitimately holds a position of private or public trust when, in fact, the defendant does not." U.S.S.G. S 3B1.3, cmt. n.2; see also United States v. Queen, 4 F.3d 925, 929 (10th Cir. 1993) (holding that the S 3B1.3 enhancement may apply to imposters). In the case of an imposter, it is not merely the defendant's misrepresentation that justifies the S 3B1.3 enhancement. In every case of fraud, the defendant will have created confidence and trust in the victim. But fraud alone does not justify the enhancement. We must "carefully distinguish between those arms-length commercial relationships where trust is created by the defendant's personality or the victim's credulity, and relationships in which the victim's trust is based on the defendant's position in the transaction." United States v. Koehn, 74 F.3d 199, 201 (10th Cir. 1996). Section 3B1.3 penalizes defendants who take advantage of a position that provides them with the "freedom to commit a `difficult-to-detect wrong.'" United States v. Moore, 29 F.3d 175, 179 (4th Cir. 1994) (quoting United States v. Hill, 915 F.2d 502, 506 (9th Cir. 1990)).

Tietjen argues that he does not qualify for the S 3B1.3 enhancement because he did not have a trust relationship with the investors and because the enhancement may not be

applied by imputing to him a co-conspirator's abuse of a position of trust. The district court applied the enhancement based on Tietjen's own abuse of a position of trust; the court did not impute to him Benz's alleged abuse of a position of trust. See Moore, 29 F.3d at 179 (holding that one co-conspirator's abuse of a position of trust is not attributable to another co-conspirator). The district court found that Tietjen falsely held himself out as having a high level of skill and experience in debentures trading. Although it was Benz who actually solicited the investors, Tietjen caused the impression that he was a legitimate, experienced debentures trader to be passed on to the ultimate investors to induce them to invest. See Queen, 4 F.3d at 930 (affirming an enhancement under S 3B1.3 where the defendant caused his employees to hold him out as a legitimate investment advisor/broker). In entrusting Tietjen with their money, the investors provided Tietjen with the discretion to invest on their behalf and expected Tietjen to make trades in their best interest, which he did not do. See United States v. Davuluri, 239 F.3d 902, 909 (7th Cir. 2001) (noting that what distinguishes situations in which S 3B1.3 should apply is "whether the defendant has broad discretion to act on behalf of the victim and the victim believes the defendant will act in the victim's best interest"). The district court did not clearly err in finding that Tietjen had abused a position of trust justifying an enhancement under S 3B1.3.

Bollin also argues that the district court erred in applying the S 3B1.3 enhancement to him because he did not actually possess any specialized knowledge and did not actually assume a position of trust vis-a-vis the victims. The district court found that although Bollin may have lacked the specialized knowledge of an actual investment broker, Bollin represented that he knew about debentures trading programs, knew their track record, and had experience investing in them. Bollin held himself out as experienced in debentures trading and caused that impression to be

extended to the ultimate investors. Bollin represented that he was the "broker" in the investment program, and the investors' funds were entrusted to him when they were transferred to his offshore trust account. Bollin demonstrated that, as far as the investors were concerned, he was vested with discretionary authority over their money when he falsely claimed to have "frozen" the funds in order to protect them. Bollin used his position as the "broker" in the transaction to lull the investors into delaying going to the authorities or suing to recoup their losses. Although Bollin also falsely represented that he was a co-investor in the debentures trading program, we cannot say the district court clearly erred in finding that Bollin occupied and abused a position of trust justifying the S 3B1.3 enhancement.

B. Two-Level Enhancement for Obstruction of Justice

Tietjen contends that the district court erred by applying a two-level enhancement under U.S.S.G. S 3C1.1 for obstruction of justice. Because Tietjen failed to raise his objection at sentencing, we review for plain error. See United States v. Kinter, 235 F.3d 192, 199 (4th Cir. 2000), cert. denied, 121 S. Ct. 1393 (2001). The district court did not err. Tietjen was convicted of conspiracy to obstruct justice under 18 U.S.C. S 1503. The applicable Guideline for obstruction of justice is S 2J1.2. Note 3 of the S 2J1.2 Commentary provides: "In the event the defendant is convicted under this section as well as for the underlying offense (i.e., the offense that is the object of the obstruction), see the Commentary to Chapter Three, Part C (Obstruction), and to S 3D1.2(c) (Groups of Closely Related Conduct)." U.S.S.G. S 2J1.2, cmt. n.3. Tietjen argues that Note 7 of S 3C1.1 governs his sentence and precludes the enhancement. We disagree. Because Tietjen was also convicted of conspiracy to commit fraud and money laundering, the offenses with respect to which the

obstruction conduct occurred, Note 8 governs. Note 8 provides:

> If the defendant is convicted both of an obstruction offense. . . and an underlying offense (the offense with respect to which the obstruction conduct occurred), the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of S 3D1.2 . . . . The offense level for that group of closely related counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section.
>
> * * *
>
> U.S.S.G. S 3C1.1, cmt. n.8. The enhancement for obstruction of justice was proper.

C. Relevant Conduct

Tietjen contends that the district court erred by using $2.4 million as the relevant conduct amount in the Guidelines calculations for Counts One and Two. Tietjen objects to the inclusion of $1 million that he never actually received because the funds were returned to Benz by Dean Witter, who refused to complete the transfer.[17] Tietjen, however, expected to receive the $1 million from Benz. He did not actually receive the funds only because the bank refused to complete the transfer. The $1 million thus was properly attributed to Tietjen. Further, there is no error in the district

[17]Tietjen also objects to the inclusion of a $250,000 sum that was also returned to Benz by the bank. Because the threshold for the relevant conduct is $2 million, see U.S.S.G. S 2S1.1(b)(2)(G), and the district court attributed to Tietjen $2.4 million, only the $1 million sum could affect Tietjen's sentence. We therefore do not reach his challenge to the inclusion of the $250,000.

court's calculation under Apprendi v. New Jersey, 530 U.S. 466 (2000), because Tietjen's sentence--60 months on Count One and 135 months on Count Two to run concurrently--did not exceed the statutory maximums. See 18 U.S.C. S 371 (maximum 5 years); 18 U.S.C. S 1956(a), (h) (maximum 20 years); Kinter, 235 F.3d at 199-200 (recognizing that the Apprendi holding is limited to factual determinations that increase the penalty for a crime beyond the prescribed statutory maximum, and holding that the prescribed statutory maximum is found by looking to the language of the statute criminalizing the offense). The district court did not err.

D. $1.2 Million Forfeiture Judgment

Gormley contends that his $1.2 million forfeiture judgment violates the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. This court considers de novo whether a forfeiture is a constitutionally excessive fine. United States v. Bajakajian, 524 U.S. 321, 336-37 (1998). The burden is on the party challenging the constitutionality of the forfeiture to demonstrate its excessiveness. United States v. Ahmad, 213 F.3d 805, 813 (4th Cir.), cert. denied, 121 S. Ct. 573 (2000). "[A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." Bajakajian, 524 U.S. at 334. To determine the proportionality of a forfeiture, a court should consider "the nature and extent of the criminal activity, its relation to other crimes, its penalties, and the harm it caused." Ahmad, 213 F.3d at 813; see also Bajakajian, 524 U.S. at 337-40.

Gormley argues that his $1.2 million forfeiture judgment is excessive under United States v. Van Brocklin, 115 F.3d 537 (8th Cir. 1997), in which the Eighth Circuit held that a forfeiture judgment of over $1.3 million against a defendant who played a secondary role in the fraudulent scheme

violated the Excessive Fines Clause. Id. at 601-02. Gormley argues that his forfeiture judgment is excessive in light of his minor role in the money laundering activities, the small personal benefit that he received, approximately $30,000 in legal fees, and his lesser culpability compared to that of the other defendants.

In United States v. Bajakajian, the defendant pleaded guilty to failure to report exported currency in the amount of $357,144. 524 U.S. at 337. Although 18 U.S.C. S 982(a)(1) required forfeiture of the entire amount involved in the offense, the Supreme Court concluded that forfeiture of the entire $357,144 violated the Excessive Fines Clause because the amount of the forfeiture was grossly disproportional to the gravity of the defendant's offense. Id. The defendant's crime was "solely a reporting offense," and his violation was "unrelated to any other unlawful activities." Id. at 337-38. Although the maximum statutory sentence was five years and/or a $250,000 fine, the maximum sentence that could have been imposed on the defendant under the Sentencing Guidelines was six months and a $5,000 maximum fine, thus indicating a minimal level of culpability. Id. at 338. Moreover, the defendant caused only minimal harm, merely depriving the government of information, but causing no loss to the public fisc. Id. The gravity of the defendant's offense thus was low, while the amount of the forfeiture was very high. Id. at 339-40. The forfeiture of the entire $357,144 therefore violated the Excessive Fines Clause. Id. at 340.

After considering the factors set forth in Bajakajian, we are satisfied that Gormley's $1.2 million forfeiture judgment is

not grossly disproportional to the gravity of his offense.[18] Unlike in Bajakajian, the nature of Gormley's criminal activity in this case was not merely a reporting violation. Gormley was involved in money laundering, and the money laundering arose out of and involved a continuing securities fraud scheme that defrauded multiple investors out of millions of dollars. See Ahmad, 213 F.3d at 817 (finding the defendant's reporting offense to be serious in part because it was part of a larger customs fraud scheme). The forfeiture judgment was not based on a single occurrence of money laundering. Instead, the defendants conducted multiple transactions over a period of nearly two years. Further, the statutory maximum for Gormley's offense was twenty years and/or a $500,000 fine, thus indicating that Congress has found the offense to be serious. See Bajakajian, 524 U.S. at 336 (noting that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature"). Under the Sentencing Guidelines, Gormley faced a sentence of ninety-seven to 121 months and a $500,000 fine. See U.S. Sent. Guidelines Manual, Sent. Table. Although the district court found Gormley eligible for a reduction in his sentence based on his "minor role" in the offense, the significant penalties Gormley faced demonstrate the gravity of his offense.

Moreover, although Gormley received only about $30,000, he is liable in a forfeiture judgment for the foreseeable criminal conduct of his co-conspirators. See United States v. McHan, 101 F.3d 1027, 1043 (4th Cir. 1996); United States v. Hurley, 63 F.3d 1, 22 (1st Cir. 1995); see also United States v. Gormley, 176 F.3d 476, 1999 WL 212008 (4th Cir. 1999) (per curiam) (unpublished) (affirming in Gormley's interlocutory

---

[18]Gormley's forfeiture was imposed under 18 U.S.C. S 982(a)(1), the same provision at issue in Bajakajian, and as part of his criminal sentence. Thus, there is no question that the forfeiture ordered against Gormley is punitive and therefore subject to analysis under the Excessive Fines Clause.

appeal the district court's ruling that Gormley may beheld jointly and severally liable for any forfeitable assets possessed by his co-defendants). As the First Circuit has noted, "holding a defendant liable for an amount of money foreseeably laundered by himself and his own co-conspirators is quite rational based on a proportionality analysis." Hurley, 63 F.3d at 23. In light of the extent of the money laundering, its relationship to the securities fraud scheme, and the harm caused, Gormley's $1.2 million forfeiture judgment is not excessive.

E. $783,545 in Restitution

Gormley contends that the order to pay restitution in the amount of $783,545 violates the Excessive Fines Clause based on the same arguments that he raised regarding his forfeiture judgment. For the same reasons that Gormley's forfeiture judgment is not excessive, we find that the restitution order is not excessive.

Gormley also argues that remand is in order because the district court failed to make factual findings that Gormley has, or may have, an ability to pay restitution. Under the Victim and Witness Protection Act (VWPA), the sentencing court must make specific factual findings with respect to a defendant's financial resources, financial needs, and earning abilities before ordering restitution. See 18 U.S.C. S 3663(a) (1994); United States v. Karam, 201 F.3d 320, 329 (4th Cir. 2000). In his reply brief, Gormley suggests for the first time that thedistrict court ordered restitution pursuant to the Mandatory Victims Restitution Act of 1996 (MVRA). The MVRA amended the VWPA by requiring sentencing courts to impose "full" restitution without considering the defendant's economic circumstances. See 18 U.S.C. SS 3663A, 3664(f)(1)(A) (Supp. V 1999); Karam, 201 F.3d at 330. Under the VWPA, the court must first consider the defendant's financial situation before determining the

amount of restitution to be paid. See 18 U.S.C. S 3664(a) (1994). Because Gormley's restitution was based on criminal activity that occurred before the MVRA's effective date, Gormley contends that application of the MVRA would violate the Ex Post Facto Clause of the United States Constitution.[19]

Assuming without deciding that the district court was required to apply the VWPA, Gormley failed to object to the district court's alleged failure to make the required findings at the time of sentencing. Because Gormley failed to object at sentencing, we review only for plain error.[20] See Karam, 201 F.3d at 330. We conclude that Gormley has failed to show

---

[19]The MVRA provides that it "shall, to the extent constitutionally permissible, be effective for sentencing proceedings in cases in which the defendant is convicted on or after [April 24, 1996]." 18 U.S.C. S 2248, statutory notes. The circuits are split on whether applying the MVRA to criminal conduct committed before the MVRA's enactment violates the Ex Post Facto Clause. Compare United States v. Edwards, 162 F.3d 87 (3d Cir. 1998) (holding that applying the MVRA to criminal conduct committed before the MVRA's enactment violates the Ex Post Facto Clause); United States v. Siegel, 153 F.3d 1256, 1259-61 (11th Cir. 1998) (same); United States v. Williams, 128 F.3d 1239, 1241 (8th Cir. 1997) (same); United States v. Baggett, 125 F.3d 1319, 1322 (9th Cir. 1997) (same); United States v. Thompson, 113 F.3d 13, 15 n.1 (2d Cir. 1997) (same); with United States v. Nichols, 169 F.3d 1255, 1279-80 (10th Cir.) (holding that restitution is not criminal punishment for the purposes of the Ex Post Facto Clause), cert. denied, 528 U.S. 934 (1999); United States v. Newman, 144 F.3d 531, 538-40 (7th Cir. 1998) (same). This circuit has not yet decided the issue.

[20]In order to correct plain error, four conditions must be met: (1) there must be an error; (2) the error must be plain, meaning obvious or, at a minimum, clear under current law; (3) the error must affect substantial rights; and (4) the reviewing court must determine if the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." United States v. Olano, 507 U.S. 725, 736 (1993); see also Castner, 50 F.3d at 1277. "Appellants bear the burden of proof with respect to prejudice of their rights." Id. at 1278 (citing Olano, 507 U.S at 735).

that the alleged lack of factual findings prejudiced his rights in any way.

A sentencing court "satisfies its duty [under the VWPA] to make specific findings if it adopts a presentence report that contains adequate factual findings to allow effective appellate review of the fine or restitution.'" Id. (quoting United States v. Castner, 50 F.3d 1267, 1277 (4th Cir. 1995)). The district court adopted the factual findings of Gormley's presentence report (PSR). The PSR indicates that Gormley is well-educated and industrious. Gormley obtained scholarships for his preparatory and college education. He worked his way through college and law school. Although Gormley likely will lose his law license as a result of his conviction and will no longer have earning potential as a lawyer, the loss of his license does not render him completely unable to earn a living, particularly because Gormley is well-educated, is in good health, and has no history of substance abuse. The PSR recommended that an installment plan be established so that Gormley could pay a restitution obligation, which the district court ordered. Moreover, Gormley does not explain how, or even whether, the district court's restitution order would have been different had the court made factual findings. See Castner, 50 F.3d at 1278 (noting that under the plain error standard, appellants bear the burden of proof with respect to prejudice of their rights); 18 U.S.C. S 3664(d) (1994) ("The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant."). The PSR contained sufficient facts to support the imposition of restitution. Gormley fails to demonstrate a probability that the amount of restitution would have been different had the court made specific findings regarding his ability to pay.

Gormley also argues that the district court violated the requirement in United States v. Johnson, 48 F.3d 806, 808-09

(4th Cir. 1995), that the district court retain authority over restitution orders. At sentencing, the district court ordered the full amount of restitution payable in monthly installments. The district court also ordered that Gormley's "ability to pay restitution will be reassessed by the probation officer after his release from custody. And if a modification is in order, report that modification to this Court for action." The court clearly stated that the probation officer should report to the court, but that the court would take any action. Thus, the court "retained both the right to review the probation officer's findings and to exercise ultimate authority regarding the payment of restitution." United States v. Dawkins, 202 F.3d 711, 717 (4th Cir.), cert. denied, 529 U.S. 1121 (2000). The district court did not improperly delegate its authority. Gormley's restitution order is affirmed.

F. Use of IRA Funds to Retain Appellate Counsel

Gormley's assets were subject to a restraining order that required him to obtain court permission for expenditures beyond ordinary living expenses. After he was convicted, Gormley asked the court for permission to spend $80,000 from his individual retirement account (IRA) to retain appellate counsel. Gormley argued that the funds in his IRA were protected from levy under Georgia law. The district court denied Gormley's request, holding that the funds in Gormley's IRA were potentially subject to forfeiture as substitute assets under 18 U.S.C. S 982(b)(1), which incorporates the substitute asset provision of 21 U.S.C. S 853(p), and that the protections for IRAs provided by Georgia law would not extend to IRA funds subject to criminal forfeiture. Gormley appeals the district court's denial of his motion. The district court's order is an order denying modification of an injunction, which we review for an abuse of discretion. See United States v. Snepp, 897 F.2d

138, 141 (4th Cir. 1990). We conclude that the district court did not abuse its discretion.

Gormley's forfeiture judgment was entered pursuant to 18 U.S.C. S 982(a)(1). Section 982(b)(1) incorporates the forfeiture provisions of 21 U.S.C. S 853. Under S 853(p), where the property initially subject to forfeiture is unavailable, the government may forfeit substitute assets:

> If any of the property described in subsection (a) of this section, as a result of any act or omission of the defendant--
>
> (1) cannot be located upon the exercise of due diligence;
>
> (2) has been transferred or sold to, or deposited with, a third party;
>
> (3) has been placed beyond the jurisdiction of the court;
>
> (4) has been substantially diminished in value; or
>
> (5) has been commingled with other propertywhich cannot be divided without difficulty;
>
> the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1)) through (5).

21 U.S.C. S 853(p). In money laundering cases, S 982(b)(2) places a narrow limitation on the forfeiture of substitute assets by protecting against forfeiture a defendant who

"acted merely as an intermediary who handled but did not retain" the laundered funds, unless the defendant conducted "three or more separate transactions involving a total of $100,000 or more in any twelve month period." 18 U.S.C. S 982(b)(2).

The Government has not yet moved to amend Gormley's forfeiture judgment to forfeit substitute assets. The order that Gormley appeals is an order leaving in place a restraining order under 21 U.S.C. S 853(e), not an order forfeiting Gormley's IRA funds. Under S 853(e), the district court may issue a restraining order to preserve the availability of the assets for forfeiture, "based on a finding of probable cause to believe that the assets are forfeitable." United States v. Monsanto, 491 U.S. 600, 615 (1989); 21 U.S.C. S 853(e); see also In re Billman, 915 F.2d 916, 919 (4th Cir. 1990). The probable cause found by the grand jury satisfies the government's burden of proving the allegations of the indictment. Id. This court has held that the pre-trial restraint provision of the RICO forfeiture statute, 18 U.S.C. S 1963(d), permits the restraint of substitute assets under S 1963(m) pending resolution of the defendant's case. Id. at 921. The restraint and substitute assets provisions of S 853 are identical to those in the RICO statute, and we see no reason to construe them differently. See id. (noting that "[S 853] and RICO forfeiture statutes should be similarly construed"). Gormley's substitute assets thus were subject to restraint to preserve their availability for forfeiture pending the outcome of his case.

The jury found Gormley liable for forfeiture of $1.2 million, and the indictment included a notice to seek substitute

assets.[21] There is probable cause to believe that at least a significant portion of the $1.2 million in laundered funds is no longer available; the funds were transferred to overseas accounts beyond the jurisdiction of the district court and were used to repay investors and other individuals. As a member of a conspiracy, Gormley is vicariously liable for the reasonably foreseeable conduct of his co-conspirators, both substantively and at sentencing. See McHan, 101 F.3d at 1042-43; Hurley, 63 F.3d at 23. His substitute assets thus may be subject to forfeiture in the event the laundered funds are determined to be unavailable. See id. (affirming the forfeiture of substitute assets where the defendants were held vicariously liable for a $136 million forfeiture based on the reasonably foreseeable money laundering activities of their co-conspirators). Gormley argues that he was merely an intermediary and is therefore entitled to the benefit of the safe harbor provided by S 982(b)(2). Gormley did not raise this argument before the district court, however, and we decline to address it at this time. We leave it to the district court to address this argument and make the appropriate findings if and when the Government moves for an order to forfeit Gormley's substitute assets.

Gormley further argues, however, that the district court should have released his IRA funds because Georgia law insulates all but 25% of the funds from forfeiture. Under Georgia Code S 18-4-22, funds in an IRA are "exempt from the process of garnishment until paid . . . . Such funds or benefits, when paid . . ., shall be exempt from the process of garnishment only to the extent provided in Code Section 18-4-20 for other disposable earnings, unless a greater exemption is otherwise provided by law." Ga. Code

---

[21]We reject Gormley's argument that his IRA is not subject to forfeiture because it was not included in the indictment's list of proposed substitute assets. The indictment did not purport to set out an exhaustive list of substitute assets, but instead set out a list"including but not limited to" certain identified assets. See United States v. Moffitt, Swerling & Kemler, P.C., 83 F.3d 660, 664 (4th Cir. 1996).

Ann.S18-4-22. Section 18- 4-20 limits the garnishment to 25%. Ga. Code Ann.S 18-4-20. We have found no federal or state case applying S 18-4-22 to a criminal forfeiture, and Gormley provides no such authority. As the district court noted, the cases that address SS 18-4-20 and 18-4-22 discuss shielding an IRA from a creditor attempting to collect a debt. See, e.g., Davis v. Davis, 288 S.E.2d 748 (Ga. Ct. App. 1982); Cooper v. Atlanta Policemen's Pension Fund, 249 S.E.2d 684 (Ga. Ct. App. 1978). Gormley's forfeiture judgment is not merely a debt, but is part of his criminal sentence. See 18 U.S.C.S 982(a)(1) (instructing the court to order forfeiture of property involved in the offense "in imposing sentence" on a person convicted of a money laundering offense).

Moreover, under the Supremacy Clause of the United States Constitution, Georgia law could not insulate Gormley's assets from forfeiture to the extent that federal law provides otherwise. A state law is preempted to the extent that it conflicts with federal law. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984). In making the determination of whether state law conflicts with federal law, "the test to apply is whether `it is impossible to comply with both state and federal law' or whether `the state law stands as an obstacle to the accomplishment of the full purposes and objectives' of the relevant federal law." National Home Equity Mortgage Ass'n v. Face, 239 F.3d 633, 637 (4th Cir. 2001) (quoting Silkwood, 464 U.S. at 248).

As noted above, a forfeiture under 18 U.S.C. S 982 is ordered as part of a defendant's sentence for a federal money laundering conviction. See 18 U.S.C. S 982(a)(1). Federal sentencing laws supersede state laws that purport to place limits on a federal defendant's criminal sentence when federal law provides otherwise. See United States v. Daniels, 929 F.2d 128, 130 (4th Cir. 1991) (noting that under the Supremacy Clause, state law could not prevent

consideration of juvenile proceedings by a federal court in determining a sentence, when federal law provides otherwise).

Further, under federal law, the funds in Gormley's IRA may be forfeited in their entirety. Section 982(a)(1) states that "any property, real or personal, involved in" the money laundering offense, without limitation or qualification, is subject to forfeiture. 18 U.S.C. S 982(a)(1) (emphasis added). The statute makes no allowance for property protected by state law. Similarly, the substitute assets provision provides that the court "shall order the forfeiture of any other property up to the value of" the initially forfeited property, in the event the original property is unavailable. 21 U.S.C. S 853(p) (emphasis added); 18 U.S.C. S 982(b)(1). Congress requires the forfeiture of any other property as substitute assets and again makes no allowance for protections offered under state law. Cf. United States v. Lot 5, 23 F.3d 359, 363 (11th Cir. 1994) (holding that because 21 U.S.C. S 881(a)(7) makes no exception for property protected by state law, the Florida homestead exemption does not protect real property from forfeiture under federal law). As this court has recognized, the substitute assets provision in S 853(p) "was enacted to make the government's forfeiture efforts more effective." United States v. Moffitt, Swerling & Kemler, P.C., 83 F.3d 660, 669 (4th Cir. 1996). Because Georgia law would insulate all but 25% of a defendant's IRA funds from forfeiture while federal law provides for full forfeiture, Georgia law conflicts with federal law and "stands as an obstacle to the accomplishment of the full purposes and objectives" of the federal money laundering forfeiture laws.

Although state law "has traditionally been relied upon to resolve questions of property rights and interests arising under [the forfeiture laws]," once a defendant's property interest has been identified, federal forfeiture law determines whether the property may be forfeited. Id. at

670; accord United States v. Dicter, 198 F.3d 1284, 1290 (11th Cir. 1999) (holding that 21 U.S.C. S 853(a) applies "irrespective of any provision of state law"), cert. denied, 121 S. Ct. 77 (2000); United States v. 18755 North Bay Road, 13 F.3d 1493, 1498 (11th Cir. 1994) (holding that federal forfeiture law preempts the Florida homestead exemption); United States v. Curtis, 965 F.2d 610, 616 (8th Cir. 1992) (holding that S 853(a) supersedes the Iowa homestead exemption); see also United States v. Rodgers, 461 U.S. 677 (1983) (holding that federal tax collection laws supersede state homestead laws); United States v. Allen, 247 F.3d 741, 794 (8th Cir. 2001) ("[W]e think the legal principles are clear that state law determines whether a property interest exists in the first instance, but federal law determines whether and how that property may be attached."). Indeed, to hold otherwise would virtually destroy the uniformity of application of the money laundering forfeiture laws and would interfere with Congress' intent. See Curtis, 965 F.2d at 616-17. We conclude that federal forfeiture law supersedes Georgia's statutory protections for IRAs. The district court did not abuse its discretion in declining to modify its restraining order.

V. CONCLUSION

For the foregoing reasons, we affirm the convictions and sentences of appellants Gormley, Bollin, and Tietjen. We also affirm the district court's order denying Gormley permission to spend funds from his IRA pending the outcome of his case.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED July 6, 2001
No. 00-4406
CR-98-152

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

JAMES GORMLEY
Defendant - Appellant

Lead Case: 00-4337 US v. Gary D. Bollin

On Petition for Rehearing and Rehearing *En Banc*

The Appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of the Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
Clerk